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CASES

DECIDED IN *Adm. 1831*

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND.

1831.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,
ADVOCATES.

VOLUME V.

EDINBURGH:

THOMAS CLARK, LAW BOOKSELLER, GEORGE'S STREET;

AND

SAUNDERS AND BENNING, LONDON.

MDCCCXXV.

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**THE LORD CHANCELLORS LYNDHURST AND BROUGHAM, AND
LORD WYNFORD, HAVE DONE THE REPORTERS THE HONOUR
TO REVISE THEIR SPEECHES.**

**LONDON:
Printed by A. SPOTTISWOODE,
New-street-square.**

CASES
DECIDED IN THE HOUSE OF LORDS,
ON APPEAL FROM THE
COURTS OF SCOTLAND,
1831.

JOHN ROBERTSON, JOHN ROBERTSON, & JAMES ROBERTSON, No. 1.
Appellants.—*John Campbell—Craefurd.*

EDWARD ALEXANDER and ALEXANDER SMITH, Respondents.—
Lushington—Sandford.

Bankrupt—Sequestration.—Circumstances in which (affirming the judgment of the Court of Session) objections to an offer of composition were repelled.

Delict.—Two parties to a cause, having,—the one pending the cause and the other after he was cited as a haver,—destroyed documents, held (reversing the judgment of the Court of Session), that they were not entitled to the expenses of a petition and complaint presented against them in respect of these acts; and that the latter acted with indiscretion, and was liable in expenses.

THE estates of the Stirling Banking Company, and the partners thereof, were sequestrated, under the bankrupt act, on the 14th of August 1826; and on the 5th of January 1830 a great majority of the creditors agreed to accept of a composition of 20s. in the pound, payable immediately on approval, under deduction of 12s. in the pound, which had been paid as dividends, and without interest on the debts from and after the date of the sequestration.*

Feb. 4, 1831.
1st Division.
Inner House.

A petition was in consequence presented to the Court of Session for approval, which was opposed by the respondents, John Robertson and his two sons John and James.

* A composition somewhat different in amount, but to the same effect, was offered by the partners to their private creditors, which was agreed to also by a majority, and petitions presented for approval. The present question, however, related exclusively to the composition offered by the banking company.

Feb. 4, 1831.

It appeared, that in the month of February 1826 the Bank became embarrassed ; and, having applied to the Bank of Scotland for assistance, they obtained an advance of £35,000, on depositing £70,000 of good bills, and they also sold Government stock to the amount of £18,000. On the 27th of March the respondent, Alexander, one of the leading partners, executed a disposition in favour of his wife of his house in Edinburgh, in liferent, and the furniture therein ; and on the 30th Thomson (another partner) granted a bond of provision in favour of his children and his wife in liferent, in security of which he infeft them in certain heritable property. A demand was on the following day (the 31st) made by the Bank of Scotland for repayment of the balance of their advance ; and on the 6th of April Alexander granted an heritable bond over his estate of Powis, in favour of his eldest son, for £10,000, and an heritable bond of annuity for £350 in favour of his wife in case she should survive him ; on both of which infestment was taken on the 21st.

The Bank continued to do business till the 12th of July, when they issued a notice that they were obliged to suspend payments ; but, as a reversion was expected, the current notes would be retired by their agent, a banker in Edinburgh. Accordingly, about £40,000 of bank notes were taken out of circulation between that period and the 14th of August, when the estates of the company were sequestrated. A few days previous to the application for sequestration a meeting of the partners and of the leading creditors had been held, when it was resolved, that they should endeavour to have Alexander Smith elected trustee ; and an advertisement was published by the Bank, requesting the support of the creditors in favour of Smith, who was accordingly elected and confirmed. At this time it was believed and held forth, that there would be a reversion after paying the creditors in full ; and on this supposition the trustee consulted counsel as to the propriety of raising actions of reduction of the deeds executed by Alexander and Thomson in March and April. He was informed, that the bonds to the children were liable to be wholly set aside, and the postnuptial provisions to wives, in so far as they exceeded a reasonable and moderate fund of subsistence ; but that, as a reversion was looked for, it was not expedient to involve the estate in litigation.

Feb. 4, 1831.

At a meeting held soon thereafter, the creditors instructed the trustee to bring the heritable properties to public sale; but this instruction was said to have reference to the alternative provision in the bankrupt act as to a public or private sale, and was not intended as a direction to sell. These estates were not sold; and in the month of August 1827 the trustee paid a dividend to the creditors of 10s. in the pound.

Early in the course of the following year Alexander and certain of the other partners attempted to make an arrangement with Kinnear, a banker in Edinburgh, so as to offer to the creditors a composition of 17s. per pound, under deduction of the dividend which had been paid. With this view Cleghorn, an accountant, was employed to investigate the affairs of the Bank, and the securities which would be afforded. The plan failed; and in August 1828 another dividend of 2s. in the pound was paid to the creditors.

Alexander having intimated his intention to offer a composition on the part of the Bank of 20s. per pound, a meeting of the creditors was held in October 1829, when, with reference to this offer, they ordered the trustee to prepare a state, “showing the particulars of the funds yet in his hands and unrealized, with the amount of the principal sum of the debts yet due, and the balance remaining after the payment thereof; also a statement of the interests due on the sums ranked up to the period of the proposed payment of 20s. per pound, and the balance for or against the estate in that event.” On this occasion the thanks of the meeting were given to the trustee and commissioners, for their conduct in the management of the sequestrated estates. Another and a very numerous meeting was held on the 30th of November, when the offer of composition in question was made; and after considering the report by the trustee, (in which the deeds executed by Alexander and Thomson in favour of their families were brought under their notice,) they unanimously agreed to entertain the offer, and instructed the trustee to call another meeting for the purpose of disposing of it. Another was in consequence held on the 5th of January 1830, when, security being tendered, the creditors present unanimously accepted of the offer; and the statutory concurrence having been obtained, a petition for approval was thereupon presented. The total number of creditors ranked was about 2,500, whose claims amounted to about £183,000. From the report of the

Feb. 4, 1831. trustee, it appeared that the creditors in value who did not accede amounted to £13,398, and their number to 663. The only opposing creditors were the appellants, who were alleged to be acting under the influence of a cashier of the Bank, whose conduct had met with the disapprobation of the partners.

The chief grounds of objection were, that the offer was not reasonable, seeing that, under a proper administration of the estate, full payment, not only of the principal, but of the interest from the date of sequestration, would be obtained: That in 1828 the Bank was able to have paid 17s. per pound: That the estates of the private partners were adequate to supply any deficiency of the company's funds; that the partners had acted illegally in granting gratuitous deeds in favour of their families at a time when they must have known they were insolvent: That illegal preferences had been given to a great body of creditors, the holders of notes: And that the agreement to accept of the composition had been accomplished by means of a collusion between the bankrupts and the trustee, and by withholding proper information from the creditors. To this it was answered, that an immediate payment of a composition, which, with former dividends, would give the creditors 20s. in the pound, was infinitely preferable to the contingent and uncertain probability of realizing as much as would pay the interest; that accordingly the great majority of the creditors, after having a full state of the affairs under their consideration, were satisfied that this was reasonable; and on this question their opinion must be held conclusive, unless fraud or collusion could be established: That although allegations to that effect were made, they were not only not proved but were not true: That the deeds executed by the partners had been executed at a time when they were under the firm belief that there would be a reversion of the company's funds, and so their estates would not be liable to be attached; and that the payment of the notes was, under the circumstances, a highly expedient and proper measure, and done with no view to give a preference.

In the course of the preparation of the record, the appellants obtained a diligence from the Lord Ordinary for recovering certain writings, conform to a specification; and in consequence the following schedule was served upon Alexander, in reference to which he was cited to depone as a haver:

“ 1. All letters received from Edward Alexander of Powis, or
“ others, connected, directly or indirectly, with the affairs of the

“ Stirling Banking Company, or the private estates of the indi- Feb. 4, 1831.
“ vidual partners, between the 11th day of February 1826 and
“ 2d day of March 1830.

“ 2. All memorials to and opinions from counsel, as well as
“ correspondence in relation to heritable securities granted by
“ Mr. Alexander in favour of his wife and children in March
“ and April 1826, and also as to the renunciation of these secu-
“ rities ; likewise in relation to a composition of 17s. per pound,
“ proposed to be paid to the creditors of the Stirling Banking
“ Company in 1828, and embracing the correspondence had
“ with Mr. James Cleghorn, accountant, employed in preparing
“ the states, &c. connected with that offer.

“ 3. All the memoranda, notes, letters, and correspondence,
“ drafts, jottings, missive letters, states, extracts and abstracts
“ of proposals, views or sketches of affairs, memorials and
“ opinions, circulars, minutes, and, in general, all the documents,
“ scrolls, and copies transmitted by Mr. Cleghorn, accountant,
“ to Mr. Alexander, in the month of December last.

“ 4. All letters of renunciation, written or subscribed by
“ Mr. James Edward Alexander, renouncing or offering to
“ renounce his heritable security over Powis.”

On being examined, he was interrogated, “ Whether or not
“ he is in possession of the documents, scrolls, and copies
“ transmitted by Mr. Cleghorn, the accountant, to the deponent,
“ in the month of December last? Depones, That though it
“ appears to the deponent, that, under the diligence, the objectors
“ are not entitled to call for all the documents referred to in the
“ foregoing interrogatory, the deponent does not object to make
“ an answer thereto ; and he accordingly depones, that all states
“ and documents regarding the negotiations with Mr. Thomas
“ Kinnear in 1828, when an attempt was made to induce
“ Mr. Kinnear to guarantee an offer of 17s. per pound to the
“ Bank creditors, and including the correspondence, jottings, and
“ calculations in Mr. Cleghorn’s hands, were transmitted to the
“ deponent by Mr. Cleghorn, at his, the deponent’s, request.
“ Depones, that the deponent destroyed the whole of the said
“ writings, with the exception of what are contained among the
“ writings already produced. Depones, that the deponent de-
“ stroyed them at different times as useless, and after the foresaid
“ negotiation failed. Interrogated, Whether or not the deponent
“ destroyed any of the documents referred to within the last two

Feb. 4, 1831. “ months? Depones, that he has no doubt that he destroyed
 “ some of them within the aforesaid period. Interrogated,
 “ Whether or not he destroyed any of these documents within
 “ the last month? Depones, that he thinks he did. Interrogated,
 “ Whether or not he destroyed any of these documents within
 “ the last fourteen days? Depones, that he did not.”

At the same time the following schedule was served on Smith, the trustee, in regard to which he was cited to depone as a haver :

“ 1. All letters received from Edward Alexander of Powis, or
 “ others, connected, directly or indirectly, with the affairs of the
 “ Stirling Banking Company, or the private estates of the
 “ individual partners, between the 11th day of February 1826
 “ and 2d day of March 1830.

“ 2. All memorials to and opinions from counsel, as well as
 “ correspondence in relation to certain heritable securities granted
 “ by Mr. Alexander in favour of his wife and children in March
 “ and April 1826, and also as to the renunciation of these secu-
 “ rities, and particularly all private letters from Mr. Edward
 “ Alexander, or from Mr. James Edward Alexander, or from
 “ Mr. John Forman W. S., in reference to the renunciation of
 “ the heritable securities, and specially in reference to Mr. James
 “ Edward Alexander’s letter of 9th May 1829.”

After making several productions, and replying to many interrogatories, he was interrogated, “ Whether or not the depo-
 “ nent has put away or destroyed any of the writings called for?
 “ Depones, that on Saturday last, after receiving his citation to
 “ appear and be examined as a haver this day, on looking over
 “ Mr. Alexander’s letters to him, he found one entirely of a
 “ private nature, and relating solely to his, Mr. Alexander’s,
 “ own private affairs: That the said letter appeared to have been
 “ written under the influence of irritation, and as it did not refer
 “ to the heritable securities, or to any intended offer of compo-
 “ sition, and appeared to the deponent to be of no consequence
 “ whatever, the deponent destroyed it.”

In consequence of these depositions, and on certain other grounds unnecessary to be stated, the appellants presented a petition and complaint to the Court of Session, praying them
 “ to find that the said Edward Alexander and Alexander Smith
 “ did wrong in concealing, putting away, or cancelling the
 “ documents before mentioned, and to inflict upon them such

“censure as your Lordships may think suitable; and farther, Feb. 4, 1831.
“on the various grounds before detailed, to remove the said
“Alexander Smith from his office as trustee, and appoint the
“said creditors to proceed in the election of a new trustee, in
“terms of the statute; and farther, to find the said Edward
“Alexander and Alexander Smith liable to the petitioners in
“the expenses of this petition and consequent procedure, and
“decern.”

In defence against this complaint, Alexander stated, that he had considered the documents of no importance—had acted through ignorance, and expressed his regret. Smith stated, that the letter alluded to was one of somewhat an intemperate nature, addressed to him by Alexander, and, under the influence of temporary irritation, making certain unfounded charges; and that, being unwilling to have these exposed to the public eye, and not being aware that he might have had the protection of the commissioners, he had destroyed the letter, for which he also expressed contrition.

In reference to the petition for approval of the composition, the Court granted the prayer thereof on the 10th July 1830, and at the same time dismissed the petition and complaint, and found the respondents entitled to expenses.*

Robertsons appealed.

Appellants.—1. The grounds on which the appellants opposed the approval of the offer of composition were relevant, and more especially that which was rested on the averment, that full payment might be obtained; but the Court below refused to allow evidence to be taken in support of this allegation, and therefore a remit ought to be made to the effect of allowing such evidence. It is no answer to say, that a great majority of the creditors accepted of the composition; the appellants are creditors, and they are entitled, in terms of the statute, to be heard in opposition to it, and to have their averments duly inquired into; but there was, in point of fact, adduced such written evidence as established the averments, or, at all events, raised such a strong case as to entitle the appellants to a thorough investigation.

2. Although it is admitted by the respondents, that they

* 8 Shaw and Dunlop, No. 512.

Feb. 4, 1831. destroyed documents bearing on the present question after the discussion had commenced, and although the trustee admits that he did so after he was specially cited under the warrant of the Court, yet the prayer of the petition and complaint has not only been refused, but the Court below have actually approved of their conduct by finding them entitled to full expenses.

Respondents.—1. The question, whether an offer of composition is reasonable, is one peculiarly fitted for the consideration of the creditors; and the legislature has declared that this shall be ascertained by the votes of a certain majority. In the present case there is not only that majority, but almost all the creditors who have any real interest in the estate have concurred, and not a single one opposes the approval, except a father and two sons acting under a latent influence. In these circumstances it is necessary to show strong and manifest grounds for holding the composition unreasonable before any sanction can be given to such a proposition. No such evidence has either been produced or referred to; on the contrary, the statements of the appellants themselves show that the offer is highly advantageous to the creditors. It is said that there may be a reversion under proper management; this is quite true; and indeed, unless there had been such a prospect, no offer of composition would have been made, and no one would have interposed as cautioner. But, on the other hand, there may be a loss; and therefore it is infinitely better to accept of an immediate and certain payment of 20s. in the pound than to continue an expensive administration, at the risk of loss, for the purpose of realizing the interest.

2. The petition and complaint was not resorted to with any fair purpose, but merely to harass the respondents, and prejudice the Court against them. The documents which were inadvertently destroyed were of no value; and copies of them, or at least of the greater part of them, were in existence, so that the appellants had no true interest to complain.

LORD CHANCELLOR.—My Lords, This is certainly one of the most important cases, in point of amount, which has for many years come before your Lordships for judgment; and in reference to the large fund which the pendency of this appeal kept in suspense, and the interest of the creditors of the insolvent's estate, your Lordships were pleased, on the report of your Committee, to advance the appeal, and allow it to be brought on before others prior in point of date. The last of the interlocutors was pronounced in the month

of July 1830; and your Lordships are now, early in the following February, about to pronounce final judgment. I trust that this will soon be no longer reckoned an extraordinary dispatch, and that the same speed will be found in other cases to result from the regular course of proceeding. Feb. 4, 1831.

My Lords, it is very much to be regretted that some provisions were not made in the statute of the 54 G. 3., the construction of which is, to a certain degree, now brought under consideration, with a view to giving that finality, if I may so speak, to proceedings in the Court below in matters arising out of bankruptcies, in Scotland, which, except in peculiar cases, is given in England to the proceedings in bankruptcy by the statute law of the land. It is known to your Lordships, that in England the great object of the Legislature being in this respect to promote dispatch, and to prevent the estates of bankrupts being torn to pieces by endless litigation, a deviation is made from the ordinary rule, which enables parties, where there have been interlocutory orders or final decrees in courts of equity, to appeal to your Lordships' House; for, in bankruptcy, no appeal is allowed, unless the Court, moved by the peculiar circumstances of the case—a thing of rare occurrence—gives leave to file a bill with the express view of enabling the party, against whom the decision is made, to appeal against it. Unfortunately this is not the law in Scotland; and although in the case of the *Stirling Banking Company v. Stein**, which was an appeal from an order of the Court of Session discharging the bankrupt, which order was opposed by a small number of creditors, and that small number stated to have received very little countenance, Lord Eldon appears to have been at first inclined to doubt whether an appeal lay against an order of the Court of Session; yet, on looking into the acts of parliament, and referring to the common law jurisdiction of this House as a Court of Appeal in all cases where the right of appeal is not expressly taken away, his Lordship had no doubt ultimately that the appeal lay. No question has been raised in the present case as to the competency of this appeal, nor could it; for, after the consideration given by Lord Eldon to the matter, and the suggestion he expressly threw out, with a view to inducing the Legislature, when the bankrupt law of Scotland, namely, the act of the 33 G. 3., should be revised, to rectify this defect, and to render the law, in that respect, similar in the two parts of the kingdom, several acts passed, and among others the 48 G. 3. (not five years after Lord Eldon had thrown out that suggestion), enacted in part for the purpose of restricting the right of appeal, and taking it away in the case of

* See 2 Bell, p. 447 and 453. The judgment of the Court of Session was affirmed 27th May 1803. *Marshall et alii, Creditors of Stein, v. Stein.*

Feb. 4, 1831. interlocutory orders, unless where the Court gave leave, or there was a difference of opinion on the Bench, yet the matter now under consideration was passed over entirely without observation, and no change made in the law previously existing. Then came the act on which this question arises, the 54 G. 3.; and I think there is nothing in that act to interfere with the appellate jurisdiction, either in a case of ordinary discharge, or in a case of discharge under the fifty-ninth section, a composition being sanctioned; nor do I understand that it is contended on the part of the Respondent that this appeal is not competent. We are therefore placed in the situation in which, with regard to the commissioners of bankrupt here, the Court of Chancery stands, a court of final resort; and without having access to more than that which appears upon the written documents before us, we are called upon to go through the whole mass of accounts for the purpose of ascertaining the question which was before the Court below, and was before the parties immediately interested; I mean the meeting of the creditors themselves. The Legislature has said, that if a composition shall be offered and accepted, at a meeting duly called, by nine-tenths in number and value of the creditors, unless that is objected to, it shall be deemed final, and shall entitle the Court to give the bankrupt his discharge, unless the Court, on objection made on behalf of any part of the creditors, shall be of opinion that it was not reasonable, or that the requisite of the statute had not been complied with; namely, the requisite of nine-tenths in number and value. The statute appears clearly, upon the sound construction of the fifty-ninth section, to have given a right to deliberate, first, upon the reasonableness, by which I understand the reasonableness of the offer at the time the creditors, nine-tenths in number and value, agreed to accept it; for I hold that to extend the time is a doctrine, ventilated by Mr. Bell, adverse to the policy of the bankrupt law—a doctrine without authority, and which would enable any creditor, by holding out and engaging in a protracted litigation, to bring the matter before the Court in circumstances altogether different from those wherein the creditors were called upon to exercise their discretion of accepting or refusing the composition. I say so with a reservation of any thing in the nature of surprise, or any new information, (*res noviter veniens ad notitiam*,) with respect to the nature of the funds at the time the composition was accepted by the creditors; but excluding any consideration of the increased value of the property between the date of the composition accepted and the period of the Court's coming to its decision. The Court is to see, first, that the composition was reasonable; and, secondly, that the statutory requisite had been complied with, by nine-tenths in number and value having accepted. Now, I take it to be clear, that though

the question of reasonableness was here before the Court, it is the duty of the Court in all cases to lean much, I may almost say exclusively, towards that which the creditors themselves, by the large statutory majority in number and value, have thought fit to accept. They decide on the nearest view of the circumstances; and they, at all events, are the best judges of what is for their own interest. The very large proportion of those who are interested is required by the Legislature to concur, for the reason that so large a proportion gives a fair security, in ordinary cases, that that which has been so offered and so accepted is good for the whole as well as for the nine-tenths; and that the remaining tenth who do not accept are influenced by an unsound view of the state of the affairs of the bankrupt, or possibly by a less sound view of their own interest than that taken by the great majority which has accepted. This does obviously not exclude the jurisdiction of the Court, where, from the peculiarity of the circumstances, it is obvious that the creditors have done wrong; if it is quite plain that they have acted under a false impression of the nature of the funds or false views taken of their own interest, it is clear that, in such a case, the Court has a right to say they have accepted an unreasonable offer, although nine-tenths in number and value concurred; but in all cases the leaning ought to be strongly in favour of an offer so accepted, and in all cases the burden of the contrary proof ought to be held strictly to lie upon those who would bring the Court to that conclusion.

My Lords, with these views of the case I have looked into the evidence which was before the Court below, and which has been brought before your Lordships. We have now to judge of the same question, whether the creditors did well in accepting that offer; and I am called upon by the counsel for the appellants in this case to advise your Lordships, that nineteen hundred persons, (five or six hundred of whom were actually present at the meeting, and the rest of whom authorized those to act for them,) claiming an amount of debt so large as 169,000*l.*, were all so little aware of what it most imported them accurately to know, or were all so careless about their own interests, as, either from underrating the value of the estate, to have taken a composition less than it would have afforded, or, for reasons largely urged at the bar, (other than the mere amount of the sum offered,) to have agreed to that which, in those circumstances, and aware of the value of the estate, they ought not, upon a sound view of their own interests, to have done. Could I advise your Lordships lightly to come to the conclusion,—even if a smaller number had constituted the meeting,—that they had formed a wrong estimate either of the bankrupt's estate or their own interest, in preferring the security of a cautioner to the chance of a better dividend in case the land were brought to sale? If I could not,

Feb. 4, 1881. there ought indeed to be very strong circumstances to make me hold, that nineteen hundred out of little more than two thousand (and of those five or six hundred actually present) were to be considered, on the representation of a four-hundredth part of the whole, to have committed such a mistake, It appears to me, to say the least of it, the supposition of a bare but most remote possibility. My Lords, Courts of law cannot act on such suppositions. Courts cannot act upon a thing merely because it is not absolutely impossible that it should be true; they must act as dealing with the affairs of men upon the ordinary rules which guide persons of sound minds in the discharge of their duties to themselves. It is clear that an offer of 20s. in the pound, ready money, with the security of solvent bondsmen, though without interest, may be a much more advisable thing to accept than the chance of 20s., plus one shilling in the pound of interest, without a bondsman, and contingent upon the sale of an estate in Scotland being so soon completed, and so successfully accomplished, as to produce that 21s. in the pound on the amount of their debts; especially as they are guaranteed against an event which at all times, and which, in 1827-8-9, of all years, was not surely a very remote possibility, namely, a fall in the value of land; and had the security of the bondsmen to stand against adverse circumstances of any nature whatever. The meeting took all this into consideration; and, upon the great numbers who concurred, it is impossible to suppose that any imposition can have been practised. My Lords, I have no doubt whatever that the Court of Session did come to a sound conclusion upon this subject; nevertheless, I cannot sanction, by passing it by unnoticed, the doubt expressed as to the relevancy of the evidence with respect to the amount of the estate. I think that doubt was not justified; for if it had been proved, that instead of being, according to the calculation, 38,000*l.*, the property, if rightly sold, would have produced, for instance, half a million, no one can deny, that this would go to show, that the great majority of creditors, though acting for their own interests, had accepted bad terms, and if it appeared, on the whole, clear that the proposition ought not to have been accepted, then the matter must have been re-opened. I shall humbly advise your Lordships to affirm the interlocutor appealed from in the first case, but without costs.

With respect to the second case, I certainly am under the necessity of recommending your Lordships to come to a different conclusion. Mr. Smith the trustee, not a man of business, but a country gentleman, acted as what we should in this country call the sole assignee of the estate and effects of the bankrupt. In the course of a controversy, which has brought the matter ultimately to this House, he was served with diligence, (a writ in the nature of a subpoena duces

Feb. 4, 1831.

tecum,) to bring all instruments in his possession before the Court, for the purposes of justice. After being served with this writ, of the exigency of which he ought to have been aware, he thinks fit to destroy a letter which, even by his own account of it upon his oath, when endeavouring to explain away this rash act of his, clearly appears to have come within the description in the writ. I say deliberately, that after having been served with that process, if he thought it as clear as noon-day that the letter did not come within exigency of the writ, he ought not to have destroyed it. But admitting, that it seemed to him to come within the exigency of the writ, he had no business to destroy it upon any fancied notion of its immateriality, or even to have exercised any discretion in considering whether it was material or not. It is needless to add, that there would be no security in the administration of justice—no security for parties whose dearest interests depend on the conservation of evidence—if such a rule should be established as that for which an opening is presented by what appears to have been said in the Court of Session when dealing with this evidence, that the gentleman seemed to have acted through inadvertence. I am satisfied he did not do it through inadvertence, though he may by no means have thought he was acting wrong; but no one shall be heard to say in a Court of law that he destroyed a paper through inadvertence at any time; least of all shall any man be heard to say that he destroyed a paper through inadvertence, when he tells you in the same breath that he destroyed it after being served with notice to produce it. That notice determines inadvertence; that notice puts all question of inadvertence out of Court; that notice makes him advertent whether he will or no. He is at his peril to be advertent; and he shall not be heard in any Court of law, either in Scotland or England, to say that, after the service of the writ, he destroyed that which the writ called upon him to produce, and to keep for the purpose of production. Even if he had thought that the paper was not aimed at by the writ, he had no business to destroy it then. There are times and seasons enough for destroying useless papers, other than those times and seasons, important in their nature, suspicious in their occurrence, which follow the service of a writ like this; and be it observed, too, when the party, in obedience to that writ, was called upon to produce it on an early day. He ought hardly at such a time to have destroyed a letter, even if he was aware, which he was not, that the letter was not one which the writ required him to keep and to produce. Nevertheless, the Court of Session have not only said that this gentleman was liable to no censure, but they have ordered the costs incurred by him to be paid by the party who made the application to the Court. I cannot understand the ground of that decision. I do not see that it is

Feb. 4, 1831. founded in reason; I am sure it is not founded in the usual practice of Courts of justice in any part of the world; and I take it to be inconsistent with the ordinary practice of the Court of Session itself; for in the case of *M'Rae v. Mackenzie*, a petition and complaint having been presented to the Court against a bankrupt, by his trustees and commissioners, for having written to them certain scurrilous letters, the Court dismissed the complaint on the ground, as I understand, that it was incompetent, by which I infer they meant that they had not jurisdiction to deal with it. That was a case for granting costs, against a party bringing another before the Court, to the party who was the object of the application, the question being one in which the Court had no jurisdiction; nevertheless, they refused to award the costs to the man not within their jurisdiction, and they refused to award them because of the impropriety of the expressions he had used in his letter. That is going on a principle different from the one on which they have determined this case; and that was a much weaker case for refusing costs to the person whose conduct was impeached than this is, for giving costs to the person charged with the indiscretion, unless it is meant to be said that it is a worse offence for a man to write an abusive letter, than for a trustee to destroy a paper, after being served with a subpoena duces tecum to keep and produce it. There is no comparison between the two cases; and the same principle which induced the Court to refuse the expenses in the former case ought, in my opinion, to have induced it to give the expenses in the latter to the party complaining. My Lords, I have said Mr. Smith is not a man of business, and that is a circumstance of great extenuation. If he had been a man of business, I should have recommended to your Lordships to remit the case, with direct words of censure; but he is not a professional man, and it is very possible he may have thought this an act of kindness towards Alexander, who had written what he calls a private letter in a moment of irritation. With respect to Alexander, I think he had better not, in the peculiarly delicate situation of the bankrupt, have destroyed any part of these papers; but he did so on a supposition very plausibly put forward, that they were the correspondence between himself and another person on the question of obtaining security, and that treaty having failed, he destroyed the letters; but there is a material circumstance, and which widely differs his case from Mr. Smith's; what he did was before he was served with the diligence of the Court, and therefore, though I am clear the Court ought not to have allowed him his expenses in this case, neither do I think the Court ought to have allowed expenses as against him, in favour of the petitioners; and I shall therefore move your Lordships that this case be sent back to the Court, with instructions, which I shall dictate, according to the

Feb. 4, 1831.

tenor of the principles I have taken the liberty to lay down. My Lords, I hold this to be a case of importance ; for it is highly necessary to guard against whatever would break in upon that most sacred rule, the preservation of evidence, in order to its being produced in our Courts of justice, and to repress any destruction of it by the hand of the keeper ; and above all, after the Court has issued its process to bring the evidence into Court. In the second case, therefore, is it your Lordships' pleasure that the interlocutor appealed from be forthwith remitted, with instructions to the Court below to dismiss the complaint as against Alexander, but without expenses, and to find that Smith ought not to have destroyed the letter of Alexander to himself, after he had been served with diligence ; thus taking upon himself to judge of its materiality, when he ought to have kept it ready to produce under the diligence, and find him liable in expenses in the matter of the petition ?

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed, and the cause remitted back to the Court of Session, with instructions to dismiss the petition and complaint as against the respondent Edward Alexander, without expenses, and to find the respondent Alexander Smith (the trustee) liable to the appellants in their costs and expenses of the said petition and complaint ; and the Lords find, that the said respondent Alexander Smith acted with indiscretion, upon his own explanation, in destroying the letter referred to in his deposition, after he had been served with diligence (and thus took upon himself to judge of its materiality) ; whereas he ought to have kept it ready to produce with the diligence.

Appellants' Authorities.—2 Bell, 464 ; Kirkpatrick, July 5, 1827 ; (5 Shaw and Dunlop, 895 ;) 2 Bell, 469 ; 6 Vesey junior, 622 ; Tait on Evidence, 179 ; Campbell, Aug. 8, 1783, (3973).

A DOBIE—RICHARDSON and CONNELL,—Solicitors.

No. 2. JAMES THOMSON, Appellant. — *Lord Advocate (Jeffrey)* —
John Campbell.

CAMPBELL'S TRUSTEES, Respondents. — *Lushington* —
David Dundas.

Partnership—Held (reversing the judgment of the Court of Session), that when there is no conclusive written evidence fixing the proportion of profits to be drawn by partners, the question is one for a Jury; and a remit made to try an issue accordingly.

Feb. 14, 1831.

1st Division.
Lord Meadow-
bank.

CAMPBELL'S Trustees raised an action before the Court of Session against James Thomson, Writer to the Signet, setting forth that their constituent, the late Archibald Campbell, " in " the year 1798, after having served an apprenticeship to a " Writer to the Signet, entered into the office of Mr. James " Thomson of Bogie, W. S., defender, as a clerk, with whom he " continued for a series of years: That, after being some time in " the defender's office, the said Archibald Campbell, at or prior " to the year 1805, came to have the principal and most confidential situation in the defender's office as head clerk, and " in that situation had the chief charge or superintendence " of his whole business: That Mr. Campbell thereafter devoted " himself so exclusively to those departments of the business " usually performed by the master or his partner, that his gains " by writings were inconsiderable, and totally inadequate to " form a sufficient remuneration either to Mr. Campbell or to " any person of his education and standing in his profession: " That it has been alleged by the defender, that Mr. Campbell " continued in the defender's office as a clerk twelve years " or more: That during the said period the said Archibald " Campbell rendered the most effectual service to the defender " in his extensive and lucrative business; but no settled account " ever took place between the defender and Mr. Campbell in " that capacity: That thereafter Mr. Campbell was assumed as " a partner by the defender; and although the precise date of " the assumption has not yet been accurately ascertained, yet it " will be established, by a writing under the defender's own hand, " particularly from a letter addressed by him to the ' Numerous " and respectable tenantry of Auchterarder,' on the 13th day of " February 1813, that the said Archibald Campbell was assumed

Feb. 14, 1831

“ a partner prior to that date : That the said Archibald Campbell
“ continued a partner with Mr. Thomson, devoting his whole
“ time exclusively and assiduously to the labours of the business,
“ down till the period of his death in January 1823 : That no
“ settled accounts ever took place between the defender and
“ Mr. Campbell as partners ; in consequence of which the
“ claims of Mr. Campbell, both as a clerk and a partner of the
“ defender, fell to be adjusted between the defender and the
“ pursuers, as Mr. Campbell's executors and trustees : That,
“ subsequent to Mr. Campbell's death, various propositions
“ were made by the pursuers to the defender for a settlement
“ of the above claims on reasonable and liberal principles,
“ which were all rejected or evaded by the defender : That
“ thereafter, when previous offers of adjustment made to the
“ defender by the pursuers, and by the said Warren Hastings
“ Sands, one of their number, acting as agent for them, had been
“ declined, the defender himself proposed that the books should
“ be laid before Mr. James Renton, accountant in Edinburgh,
“ to make up a state of the profits appearing from the books to
“ have been made on the same business, to which the pursuers
“ at once consented ; and, accordingly, after a labour of nearly
“ two years, Mr. Renton prepared a state, to be produced in
“ the process to follow hereon, from which it appeared that the
“ net realized profits of the said concern, from the 1st day of
“ January 1813 till the 28th day of January 1823, the period of
“ Mr. Campbell's death, amounted to £23,955 17s. 3d. Ster-
“ ling, exclusive of progressive interest, and exclusive also of
“ Mr. Campbell's share of £1,409 7s. 2d. of profits and outlays
“ still outstanding, but which will be ultimately realized by the
“ defender.” They therefore concluded to have it found and
declared, “ that the said Archibald Campbell was a partner of
“ the defender, at least from and since the 1st day of January
“ 1813, and as such that he is entitled to one-half of the profits
“ and emoluments realized by the concern from that date down
“ to the dissolution of the partnership by Mr. Campbell's death
“ on the 28th day of January 1823 ; and that the said Archibald
“ Campbell was entitled to a fair and adequate remuneration
“ from the defender for the charge and superintendence taken by
“ him of the defender's extensive business, as clerk, prior to the
“ said partnership, according to the rate of payment which shall

Feb. 14, 1831. " be declared just and reasonable by persons of experience and integrity in the same profession."

In defence Thomson admitted, that Campbell had been a clerk with him from 1798 till 1813: That in April of that latter year he admitted him as a partner to the extent of one-third share; and he stated, that at the same time he had settled with him for all claims prior thereto as clerk. Campbell's Trustees denied that there had been any settlement relative to Campbell's claims as a clerk; averred that he was admitted as a partner in January 1813; and they founded on a letter addressed by Thomson to the tenantry of one of the estates of which he had the management, dated February 1813, in which he stated, that " it being inconvenient for me to leave " Edinburgh, I have sent my assistant and partner, Mr. Archibald Campbell W. S., to collect the rents," &c. This, they maintained, proved the fact of the partnership; and that, as it was not alleged that there was any special contract, the rule of law was, that each partner was entitled to one-half of the profits.

To this Thomson answered, that there was no such rule of law as that alleged: That there was merely a presumption that the profits were to be divided in proportion to the stock or skill contributed: That this was a question of fact to be fixed by a jury; and that Campbell having contributed neither capital nor superior skill, nor brought any adequate or proportional increase of business, and being a young man, with the prospect of succeeding to an established business, it was impossible to presume that he was to have one-half of the profits.

The Lord Ordinary, in respect of its being admitted, not generally, but under different qualifications, which are denied, that Mr. Campbell was assumed as a partner by Mr. Thomson, and the evidence to establish a co-partnery being otherways incomplete and defective, while (assuming that there was a partnership betwixt the parties) there is no evidence whatsoever of any agreement as to the extent of the interest of the parties respectively in the profit and loss of the alleged concern; and being necessary that all these different points should, before further procedure, be fixed and determined; found that this case must be remitted to the Jury Court, in order that issues, exhausting the said matters, may be prepared and sent for the determination of a jury.

Feb. 14, 1831.

Campbell's trustees reclaimed, and prayed the Court to alter and find that as Campbell was a partner at least from January 1813, he was legally entitled to one half of the free profits and emoluments realized by the concern from that date down to the dissolution of the partnership by his death: That he was entitled to a fair remuneration for his services as clerk; and that on these different claims the defender was bound to hold count and reckoning, and to pay as concluded for in the summons.

The Court remitted to the Lord Ordinary to reconsider whether the case should be remitted to the Jury Court, or reported upon cases in the usual form; and his Lordship having reported, their Lordships, on the 26th of May 1829, found, "That it is established by written evidence that a copartnery was entered into in January 1813, in respect of which all previous claims on the part of Mr. Campbell must be pronounced to have been passed from and discharged. Further, that the presumption of law is, that there was to be an equal participation in the profits of the business between the two partners;" and remitted to the Lord Ordinary to hear parties farther in the cause.*

Both parties appealed.

Appellant and Respondent (Thomson).—The Court below have misapprehended the rule laid down by the institutional writers. That rule is, not that there shall be an equal participation of profits, but that the profits shall be divided on a principle of equality, having reference to the amount of the stock contributed. Thus, if one partner shall contribute two-thirds and another a third, and there is no stipulation as to the proportion in which the profits are to be divided, the law does not presume that they shall be equally divided—that is, that each partner shall receive one-half, but that they shall be divided on the principle of equality, meaning that the one shall get two-thirds and the other one-third. But where the parties are at issue as to the value of the amount of the stock contributed, the question must be submitted to a Jury, who will take all the circumstances into consideration, arising either from the relative position of the partners, their comparative skill, experience, means of enlarging the business, and the probabilities of the one succeeding to the

* 7 Shaw and Dunlop, No. 333.

Feb. 14, 1831.

other, and will arrive at the result as to what is the true contribution of stock, whether consisting of capital, money, clients, &c., and from that be able to fix the proportion of the profits which ought to be drawn by each of them. This was the course followed in the English case of *Peacock v. Peacock*, which is in accordance with the doctrines of Stair and Erskine, and the decision of the Court of Session in the case of *Anderson v. Russell*. But the Court below, proceeding on a misapprehension of the word equality, have found, from the mere fact of partnership, that there must be an equal participation of profits; and this they did without taking any evidence as to the comparative value of the stock contributed.

2. In regard to the cross-appeal, the appellant was always ready to go into an inquiry as to the matter of fact, whether all claims by Campbell as clerk had not been settled; but on this there was satisfactory evidence before the Court.

Respondents and Appellants (Campbell's Trustees).—Where there is no special contract between partners fixing the rate at which the profits are to be divided, the established rule of the law of Scotland is, that they shall be equally divided. It is so laid down by Lord Stair and by Erskine, and was so decided in the cases of *Brock* and *M'Whirter*; and in England was recognized by Lord Eldon in the case of *Peacock*.

2. Although the respondents were willing to have acquiesced in the judgment of the Court below relative to Campbell's claims as a clerk, yet, in order to keep the question open, they have appealed, on the ground that the decision was pronounced without any evidence, and merely on the supposition that, because Campbell was admitted a partner in January 1813, it was probable he would renounce all previous existing claims. This was a gratuitous assumption not warranted by the facts.

LORD WYNFORD.—My Lords, it appears to me that the cases to which counsel have referred are decisive of that now under your Lordships' consideration. The judgment of the Court of King's Bench, in the case of *Peacock v. Peacock*, does not seem to me to be at all affected by the decision of my Lord Eldon in the Court of Chancery. I have looked also to another authority, greater than that of the noble Lord's I have mentioned. In questions of Scotch law, the opinions of Scotch lawyers ought to prevail over that of the highest legal authorities in this country. The opinion

of my Lord Stair is directly opposed to that of the Court of Session. Feb. 14, 1831.

The question, my Lords, is, Whether, when there is no agreement as to any specific share of partnership property, the Court is bound, upon a presumption of law, to say that the profit and loss must be divided into equal shares? In the Court below the Lord Ordinary had decided that it ought to be sent to a jury, to consider, under all the circumstances of the case, what the proportion should be. The Court of Session, however, considered the decision of the Lord Ordinary incorrect, and took upon themselves to declare that it must be taken as a clear principle of law, that where there is no express contract fixing the rights of the parties, the partnership property and the partnership profits must be equally divided. My Lords, I cannot help thinking, that if that were the law, it would be highly fit that it should be well understood, in order that the consequences of that legal presumption might be guarded against; the application of such a principle will prevent many partnerships, which are beneficial to both parties, and especially to the party who takes the smaller share, from being formed. What person who is in the possession of an established business, and of the good-will of that business, would take a clerk into partnership with him, if, by the mere effect of taking him into partnership, he was to confer upon such clerk an equal share of all the profits, and a portion of the good-will which he had acquired, and which he might sell for a valuable consideration? Such a law must prevent young men from being advanced from the situation of clerks to the more respectable and more permanent situation of partners. My Lords, whatever the convenience and inconvenience of the rule may be, if the law is so settled, your Lordships, sitting judicially, must decide according to it. I cannot, however, think that it is so settled; the contrary appears to be clearly the understanding of Lord Stair. Lord Stair says, "Society," that is partnership, "may be described a contract for communicating the profit or loss of that which is brought into the society proportionably, according to the share and interest of each partner;" so that if they have different shares or interests, a division according to the proportion of partnership in each share or interest must be made. "It is true," says that learned writer, "that if there appear no inequality in the stock of the partners, when no proportion is expressed, equal share of profit and loss are understood." He was writing before there was a Jury Court in Scotland, when the Judges were called upon to decide the question of law and fact; and I take Lord Stair to say nothing more than that which I ventured to intimate to your Lordships a long time ago as my opinion, that if I was to direct a jury, or I was sitting in a situation to exercise an opinion, both upon the law and the fact, I should say, "If there be no evidence to guide

Feb. 14, 1831. my judgment, I will make the division equal ; I will look at the circumstances, and I will infer from the circumstances the intention of the parties ; but if there is no circumstance inducing the Court to give more to one than to the other, then the shares should be equal." But let us see what Lord Stair says farther : " Or if the skill or industry of some of the partners be of great importance, the society may consist in these terms,—that those persons shall have no share of the loss, and shall have such a share of the profit, according to the sentence of Sulpitius ; but if such inequality of industry, &c. appear not"—that is, if no such circumstance appear—" the sentence of Mucius rejecting such inequality of shares is just, and there is no contrariety between the opinions of both." If the circumstances of both parties are the same, their shares are to be equal. If one brings more capital, or if one was in possession of a business to which he admits the other to a participation, it is to be considered whether these advantages do not entitle him to a larger share of the profits of the concern. Now, in this very case, a man in an established business takes a young man into partnership ; the good-will which the first partner has is a marketable article, as much as any part of the stock in trade. Does not that advantage create an inequality ? Again, it is fair to presume that he who has been in the business a long time has more knowledge of the business than the young man just admitted into the concern. There were those circumstances, therefore, to be considered by the Court, in deciding whether the share should be equal or unequal ; and I cannot help thinking it would be gross injustice if, in such a case, the question of the amount of share be not sent to a jury. Your Lordships cannot take upon yourselves to settle the proportion of the parties. I think, with humble deference, that if you did, your Lordships would be assuming a duty you are unequal to the discharge of. Perhaps I have had as much experience in these matters as most of your Lordships, but I profess myself totally incompetent to settle such a question. The fittest persons to decide a case of this sort are a jury of merchants. The case of Brock v. Brown is referred to, but that case does not appear to me to affect this question. The Court of Session did not decide that they would not give unequal shares ; all that was decided in that case was, they could not allow one of the partners to claim for labour performed. I think the Court were perfectly right in that decision ; for the moment a partnership is established there is an end of any implied contract for service, and the parties could be considered only as partners, and not as master and servant. The opinion of Lord Stair is supported, by the judgment of Lord Ellenborough, which is expressly in point upon the present occasion. It is supposed Lord

Eldon's opinion differs from that of Lord Ellenborough. If it had appeared to me that there was ground for that supposition, I should have thought that this case ought not to be decided till we had an opportunity of consulting Lord Eldon, but I think that is not the case. Lord Eldon must have thought that a different proportion might be given, or his Lordship would not have directed an issue to ascertain the amount of the shares of the parties. His Lordship must be taken to have held that the jury were to decide upon the quantum. When the case came back his Lordship was surprised at the quantum found by the jury. What led the noble Lord to express that surprise I do not know. It cannot be taken from hence I think that he thought that the jury had nothing to do with the quantum at all, but merely that the apportionment which they found was not a just one. Under these circumstances, my Lords, unless my noble and learned friend on the woolsack should differ with me, I should humbly move your Lordships that this interlocutor be reversed, and that the matter be sent back to the Court of Session, with a direction to send an issue to the Jury Court to ascertain, under all the circumstances of the case, what is the fair proportion of this business to which this party was entitled. Feb. 14, 1831.

LORD CHANCELLOR.—My Lords, I so entirely agree in the view which the noble Lord has just taken of this case, that I should not have troubled you with a single observation, further than doing myself the honour of seconding his proposition, had not this been a case where the opinion of your Lordships does not go to affirm the judgment; and your Lordships are aware that in such circumstances it is generally deemed fit, for the satisfaction of the parties, and out of respect to the Court below, to assign reasons for the reversal. I shall therefore shortly follow my noble and learned friend in stating my view of the case. My Lords, the point to which I wish to call the attention of the House is this: It is said to be the presumption of law, that where there is a partnership, there is to be an equal participation in the profits of the business. Now, my Lords, for this, as a presumption of law, it is correctly stated by my noble and learned friend, that there exists no ground. If it had been put as a presumption of fact, I could have better understood the statement. If I were trying at *Nisi Prius* the question, what proportion the partners in a concern were severally entitled to,—that being the question of fact sent to a jury by Lord Eldon in *Peacock v. Peacock*, and tried afterwards by Lord Ellenborough,—I should be disposed to advise the jury, that the matter of equal division would be a convenient doctrine of fact, and form the ground for a convenient inference to be drawn in the absence of other evidence; but that would be only supposing there was no other evidence in the cause—that

Feb. 14, 1931. would be supposing, above all, that if there was any other evidence which could be found to alter the proportions, that evidence must furnish the rule ; and that would be an additional ground for saying, that it must be a presumption of fact, and not of law ; but here the Court confound, as it appears to me, the presumption of fact and the presumption of law, and make that a presumption of law which, if admitted, excludes all question of fact ; *cadit questio* as to the fact the moment you allow that, in the absence of a written contract, the law holds the shares to be equal. My Lords, this is a proposition as to which I think the Court have been misled by a case which does not appear to have been very explicitly stated, and which does not seem to have excited very great attention. Their doctrine goes this length, that whatever the circumstances,—taking, for instance, the case of a banker's clerk who is admitted into the house,—unless there be a special contract to exclude the legal presumption, the legal presumption shall give him an equal share of the profits, and shall exclude all evidence of the fact, and all consideration of the particular circumstances of each case. To that doctrine which this interlocutor has embodied I cannot, any more than my noble friend, accede in point of law. My noble and learned friend, if he was sitting at Nisi Prius directing a jury, would very probably take that for the ground of his direction, as being the convenient division, in the total absence of other evidence to break in upon it. It is, certainly, the line I should adopt, in dealing with the question of fact, and having taken the opportunity afforded by one of the learned Chief Justices, sitting near us, as the argument proceeded, I find that he has no doubt upon this subject. When a case appears so clear, which has been otherwise decided below, a person doubts sometimes whether he is not taking too confident a view of the case ; and I wished to know whether the opinion and judgment of that learned judge confirmed my own ; and I have received an intimation, that his clear opinion is precisely the same as that stated by my noble and learned friend, and to which I entirely accede, that where there is no evidence—not shutting out evidence, but where there is none—he should in all cases direct a jury to take into consideration the fairness of an equal division, but not discountenancing evidence—rather courting evidence—rather regretting that there was no evidence—and only having recourse to that presumption, in the last resort, for want of evidence. This is not the doctrine of the Court below ; for they say, we do not court evidence—we, on the contrary, rather shut it out ; for we conceive we are bound to give effect to this, as a legal presumption to overrule it. My Lords, it is more satisfactory, in deciding on appeals from the Scotch Courts, where it can be done, to refer to cases in the Courts of Scotland than in those of England. Nevertheless, the greatest deference is due to

the authority of English Courts, whether of common law or of equity, in mercantile questions; because our law, in that, purports to proceed on the same principles as theirs; and I should with difficulty attempt to select any one chapter of the Scotch mercantile law which differs in its principle, or is intended to differ in its principle, though there may be in some respects a difference in its details, from the law of England. Undoubtedly, if the cases in the Scotch Courts had been founded on different principles, and running in an opposite direction to ours, we should have been bound to prefer their authority; but there appears to be no distinction. I will first say a word with respect to the authority of the civil law, for I see that is adverted to in some of the text writers. I deny that the civil law is of direct authority in the Scotch, any more than it is in the English common law. Much respect is due to the wisdom of the makers of and the practisers under that venerable system of jurisprudence, recommended by its great antiquity—by the number of ages during which it existed—by the numberless millions of people whose various concerns it regulated during those ages, and above all by its beautiful symmetry—by its unexampled precision and fulness—by the consistency in principle with themselves of all the arrangements of that code; nevertheless, it has no direct weight as an authority in the Courts either of Scotch or English law, whatever deference it may claim as a monument of the wisdom of old times, and the ability of learned men. But if there is any one department in which the authority of the civil law shall not be taken to rule points in our day, it is that of mercantile jurisprudence, where the defective nature of ancient commercial dealings and commercial institutions connected with them, and growing out of them, necessarily makes that code of far less weight than in other cases. I deny not that the rule laid down in this interlocutor was the rule of the civil law—it may be taken to have been so; and that, in order to exclude the equality of shares of profits, it was requisite that there should be an express stipulation, in the absence of which an equal division was held to be the presumption—I may say the presumption of law—not to the extent of excluding an express contract, but to the extent stated in this interlocutor. But I not only deny the authority of the civil law as a direct authority; I deny the weight of it—the general deference to it—in a question of mercantile law, in mercantile times, and in a mercantile country. Then the authorities of the English law are the other way. Permit me to observe, that as to questions of partnership though one Court in this country has peculiarly the cognizance of these—namely, the Court of Equity—inasmuch as at law partners are considered as one and the same person—yet when that difficulty is got over by sending an issue to trial, the question of the shares of the partners came with

Feb. 14, 1821. peculiar advantage under the cognizance of a learned judge like Lord Ellenborough, and a jury of merchants in the city of London, than which judge no one had ever greater experience in mercantile law, and than which juries no men are better enabled to decide on such matters by their judicial experience as well as by their mercantile habits. It appears in the report of the case of *Peacock v. Peacock*, that Lord Ellenborough entertained no doubt whatever—he excluded at once the idea of equal division, and directed the jury to take all the circumstances into their account, who found one-fourth, on the grounds stated and the facts proved, to be the proper division. And it is not Lord Ellenborough's decision alone on which I proceed here, but Lord Eldon's—for he sent the very question to a jury; but if he had held that there was, in the absence of a written contract, a presumption of law in favour of equality, it would have been fruitless to have done more than send the question—Are A. and B. partners? for the first branch of the issue; and then for the second—Is there any thing in their connection with each other to alter by special contract the presumption of law in the absence of an express agreement? These would have been the questions Lord Eldon would have sent to the jury; and when the record came back, instead of merely making an observation in disparagement of the verdict—for it amounted to no more—he would at once have said, they had determined a question he had never sent to them; but if he had said so, it would have been in disparagement of his own order in directing the issue, for he had directed them to inquire what was the share and amount; and all he appears to have said on the matter afterwards coming before him was, “I do not exactly see on what ground the jury came to that conclusion.” If his Lordship had known as much as my noble and learned friend, or as Lord Ellenborough, of what passes in Guildhall, he would not have expressed his surprise; for it is not uncommon in London that the fourth part should be the proportion in the case of father and son. There was no new trial directed by Lord Eldon. It is said the party acquiesced in it, and therefore he was satisfied; but it appears that it was only as to the question of fact—the exact proportion of one-fourth—that Lord Eldon felt a doubt, not seeing how that was established. But if he had not intended to send that to the jury as a question of fact, as it appears to me, Lord Eldon would have set it right when it came before him. Now, my Lords, such being the only matter laid before us with respect to English law, how stands the Scotch law, as it appears from cases or the authority of text writers? Lord Stair has been alluded to—the high authority of Lord Stair—by my noble and learned friend. Erskine's is nothing in derogation of that authority, when accurately viewed. Lord Bankton's is an express affirmance of it;

and then your Lordships have the case which has been cited here, Feb. 14, 1831. and to the accuracy of that report I hear no objection urged on the other side of the Bar—the case of *Russel v. Anderson*. There you find the learned judge is dealing with this very proposition. He does not accede to the proposition of law as a general one; for he considers it to apply only to the case of parties associating on equal terms, both in stock and labour. In point of law, the party founds his plea on the equal rights of partners, from which he derives those funds,—that, if there be not indisputable evidence of a different arrangement, equal rights must be presumed. What is meant by equal rights strictly applies to the shares you have equal rights to—shares which may be equal or unequal, according to the circumstances of the case. He deals with this as the proposition. He cites Lord Stair and Lord Bankton; he then states, that where there is room for doubt, it must be sent to the Jury Court. He then cites *Peacock v. Peacock*; and he supposes the case of a clerk admitted as a partner into Sir William Forbes's Banking House, and holds that it could not be supposed in such a case—though for this the respondent must contend—that he would be entitled to an equal share of the profits with the heads of that house. This is an authority on all-fours, and there is no decision on the other side.

My Lords, upon these grounds, taking it simply as a question of Scotch law, deciding nothing further—as it ought to be our rule in no case to go further than the question before us—saying nothing at all about *Peacock v. Peacock*, except to explain the discrepancy which is inaccurately supposed to have existed between the Court of Equity and the learned judge at *Nisi Prius*—saying nothing respecting the law, except as a question of Scotch law, established by the decision of a learned judge, established by the text writers of the greatest eminence—upon these grounds I concur with my noble and learned friend in advising your Lordships to reverse the decision, and remit the cause to the Court of Session, in order that they may send the question to the Jury Court, as they were in the course of doing, but for the impediment thrown in their way by the erroneous position laid down. But I would strongly recommend to the parties to make an arrangement themselves and take one-third, and then we shall hear no more of it, and they will save a great expense.

The Lord Advocate submitted, that on the cross-appeal, whatever this House might do in regard to the question of partnership, they ought to decide that Mr. Campbell had waived all claims for further payment for his services as clerk when taken into partnership.

LORD CHANCELLOR.—This appears to be also a matter of fact proper to be submitted to a jury; both questions should be disposed of in the same way, by reversing the interlocutor, so far as appealed

Feb. 14, 1831. from in the original and in the cross-appeal, and remitting the cause to the Court of Session, with an instruction to them to direct an issue or issues to be tried by a jury with regard to the whole matters in dispute between the parties.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of, be reversed; and it is further ordered, That the cause be remitted back to the Lords of Session, of the first division, in Scotland, with instructions to them to direct an issue or issues to be tried by a jury, which issue or issues shall include the whole matters in dispute between the parties in this cause; or to proceed otherwise in the said cause as they shall deem just, and shall be consistent with this judgment.

Appellant's Authorities. — Anderson, May 22, 1828 (6 Shaw & Dun. 836); Peacock, 16 Vesey junior, 49; 2 Campbell, 45.

Respondents' Authorities. — 1 Stair, 16, 3; 3 Ersk. 3, 19; Brock, Dec. 9, 1696 (14,563); M'Whirter, Feb. 14, 1822 (1 Shaw and Dun. 319); Gow on Partnership, 9; Struthers, May 19, 1826, (ante Vol. II. 153.

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 3. GEORGE PENTLAND, Appellant.—*Robertson—M'Neil.*

Hon. J. WOLFE MURRAY, and Others, (for the Hon. ALEX. OLIPHANT MURRAY,) and TRUSTEES of Lord and Lady ELIBANK, Respondents.—*Lord Advocate (Jeffrey)—Walker.*

Landlord and Tenant. — Circumstances in which it was found (affirming the judgment of the Court of Session) that a party had acquired no real right to a farm under an improbativ lease.

Feb. 15, 1831. THE Hon. Alexander Oliphant Murray, eldest son of Lord Elibank, is the proprietor of the entailed estate of Pitheavlis, (situated in Perthshire,) subject to a reserved right of liferent in favour of his mother. For some time prior to 1818 the appellant Pentland was in possession, under a lease, of certain parts of the estate called Greenyards and Unthank. On the 13th of April 1818 Lord Elibank (then the Hon. Mr. Murray,

1st DIVISION.
Lord Meadow-
bank.

and at which time his son was a pupil,) addressed to Pentland this letter :—“ I, as administrator-in-law for my son, Alexander Oliphant Murray, as proprietor of the lands of Pitheavlis, “ authorize you to prepare building leases, of five acres each, for “ yourself and children, at the present rents, of ninety-nine “ years, as authorized by Act of Parliament ; as also to prepare “ a lease to you, of nineteen years, of the quarry of Pitheavlis, “ at ten pounds of rent per annum, with liberty to open others, if “ wished, on the grounds. The building leases to be on the “ grounds you point out proper on the estate, and with the “ regular qualifications attending such leases, according to Act of “ Parliament ; and I bind myself to implement the same when “ drawn out. I am,” &c. Feb. 15, 1831.

Nothing farther appeared to have been done till 1822, when Pentland caused a draft of two leases to be prepared, one in favour of himself, of five acres of the lands of Greenyards, and another in favour of his son Colin, of four acres of the lands of Unthank and one acre of Greenyards. These drafts were said to be marked thus : “ I approve, and to be extended. A. O. Murray.” At this time Mr. Murray was about seventeen years of age. The leases were extended and signed by Lord Elibank, but not by Mr. Murray, who, having gone abroad, granted a commission in favour of Lord Cringletie and others. Lord and Lady Elibank about the same time executed a conveyance of their property to trustees for behoof of their creditors.

The commissioners of Mr. Murray, with concurrence of the trustees, presented a petition in 1825 to the sheriff of Perthshire, stating, that Pentland was in arrears of rent for the lands of Greenyard and Unthank from Candlemas 1823, and praying for warrant of sequestration and of sale. In defence, Pentland founded upon the above documents, and averred that, in virtue of them, he and his son had possessed the lands, and on the faith of them had erected buildings.* Of this averment the sheriff allowed a proof, on advising which he pronounced this interlocutor :—“ Finds nothing proven tending to “ show any alteration in the mode of occupation of Greenyards “ and Unthank, after Whitsunday 1822, from what previously

* Pentland farther alleged that he had a claim of compensation against Lord Elibank, who had right to the rents *jure mariti*, and was due him large sums ; but both debt, and right to compensate, were denied.

Feb. 15, 1831. “ took place, from which it can be inferred that at the said term
“ a change of possession was adopted, and the building leases
“ then entered upon; but that, on the contrary, the same mode
“ of possession continued after that term as was enjoyed by the
“ defender previous thereto, when he occupied the lands of
“ Greenyards at a rent of £60, and the lands of Unthank at a
“ rent of £30; refuses, in these circumstances, to sustain
“ the building leases founded on by the defender, which are
“ incomplete, and do not appear to have been acted upon;”
and therefore decerned in terms of the prayer of the petition.
Pentland having complained by advocacy, the Lord Ordinary
pronounced this judgment:—“ Finds, that none of the documents
“ founded on by the advocator (whether taken individually or col-
“ lectively) are, even if the same had been followed by possession,
“ sufficient to constitute a lease, binding and effectual upon the
“ Honourable Alexander Murray, who was, at the date thereof,
“ under the age of majority, but above the years of pupillarity:
“ Finds, that even if the said documents could have been held,
“ if followed by possession upon his part, to be sufficient for
“ constituting the contract of lease between the parties, there has
“ been no proof of such possession adduced, or offered to be
“ brought; and that the proof led in the inferior Court is, upon
“ this point, altogether defective and incomplete: Therefore
“ repels the reasons of advocacy, remits the cause simpliciter
“ to the sheriff, and decerns; finds the advocator liable in
“ expenses.” Against these interlocutors the appellant reclaimed;
but the Court, on the 3d of March 1829, adhered.*

Pentland appealed.

Appellant.—To constitute a real right of lease, it is not necessary, according to the law of Scotland, that there should be a formal probative deed; it is sufficient if there be any writing intervening between the parties, and that possession follow thereon. In the present case Lord Elibank, as administrator of his son, and as such having full power, granted the missive of April 1818; and Mr. Murray, at a time when, although minor, he was entitled to act for himself, subscribed the draft of the lease, and his father subscribed the extended deed. These were quite suf-

* 7 Shaw and Dunlop, No. 256.

ficient to afford a valid title to the appellant. But it is said that he had no possession in virtue of this title. The fact that he was in possession is not disputed, and the allegation merely is, that the possession was not imputable to that title. But the appellant has a right to impute his possession to that title, and there was no necessity to go through the ceremony of removing and again taking possession; besides, the proof established that acts had been done on the faith of the title. Feb. 15, 1891.

Respondents.—As Mr. Murray was the proprietor of the estate, his father had no power to grant leases, and more especially such as those alleged to have been made; and as Mr. Murray was a minor, without tutors or curators, and besides was an heir of entail, he could not execute such deeds, which were equivalent to an alienation. But, independent of this, no such deeds were ever executed; and it is not even alleged that the appellant ever subscribed any lease, so that he remained free. It is farther established by the judgment of the Court of Session, (which is equivalent to a special verdict, in terms of the late Judicature act,) that he never had possession with reference to the leases, and consequently he cannot found on them as affording him any real right in the lands, or any defence against the present claim.

LORD CHANCELLOR.—Under all the circumstances of this case, the interlocutors complained of appear to me to be quite free from objection. Merely, therefore, expressing my concurrence in the judgment of the Court below, I shall make no apology for simply moving your Lordships, that the interlocutors complained of be affirmed, but without costs.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

Appellant's Authorities.—10 Geo. III. c. 5; Moray, July 23, 1772 (4,392); Grant, July 10, 1718 (15,180); Grieve, June 15, 1797 (5,951); M'Pherson, May 12, 1815 (F. C.); 1 Bell on Leases, 307,316; 1 Ersk. 7, 14, and 23.

Respondents' Authorities.—1 Ersk. 7, 16; 6 Geo. IV. c. 120, § 40.

G. W. POOLE—RICHARDSON and CONNELL,—Solicitors.

No. 4. SIR JAMES COLQUHOUN of Luss, Bart. Appellant. — *Lord Advocate (Jeffrey)*—*A. M'Neil*.

ROBERT COLQUHOUN, Respondent.—*Lushington*—*T. H. Miller*.

Service—Entail.—A proprietor in fee simple having executed an entail of his estate in favour of his eldest son and issue—whom failing, of the second son and issue ; whom failing, of other substitutes, reserving his own liferent, and power to revoke, alter, sell, and burden the estate. The eldest son predeceased him, without taking infeftment, and the reserved powers never were exercised ; the entailer at his death left the deed undelivered. The second son survived, but made up no titles. A general service was expedite in favour of his son, as heir of tailzie and provision of his grandfather, the entailer, and infeftment followed under the precept in the entail.—Question remitted for the opinion of all the Judges ; 1. Whether the service was valid ? and, 2. Whether the service should have been to the eldest son, the institute in the entail, or to any other and what person ?

Feb. 17, 1831.

1ST DIVISION.
Lord Newton.

ROBERT COLQUHOUN, proprietor in fee-simple of the estate of Camstraddan, (of which Colquhoun of Luss was superior,) entered into a postnuptial contract with Helen Johnstone on the 30th of September 1741, by which he bound himself to resign the lands in his own favour, “ and the heir-male “ of his body of this marriage ; which failing, his heirs and “ assignees whatsoever in fee,” under burden of an annuity to his wife, and subject to a power of creating heritable securities to a limited extent. In virtue of this deed sasine was taken. Of the marriage he had two sons, James and Walter ; and after it had been dissolved by the death of his wife, he executed, on the 28th of January 1774, an entail of the estate. By this deed he disposed the lands “ to James Colquhoun, my eldest son, and “ the heirs whatsoever of his body ; whom failing, to my other “ heirs of tailzie and provision after named ;” and granted precept of sasine and procuratory of resignation for “ new infeftments “ of the same to be made, given, and granted to the said James “ Colquhoun, my eldest son and the heirs whatsoever, and the “ heirs to be procreated of his body ; whom failing, to Walter “ Colquhoun, my second son, and the heirs whomsoever to “ be procreated of his body ; whom failing, to any other “ son or sons to be procreated of my body, the elder always “ succeeding before the younger, and the heirs whomsoever “ respectively to be procreated of their bodies successively ;

“whom failing,” &c. He reserved to himself, “not only my own
 “liferent of the lands and others before disposed, but also full
 “power and liberty to me to sell, alienate, and impignorate, or
 “dispose the said lands and others, or any part thereof, and to
 “revoke, alter, innovate, or change these presents, in whole or
 “in part, at any time of my life, even upon death-bed; and all
 “which revocations or alterations so to be made by me shall be
 “understood to be a part of the present tailzie, and shall be held
 “to be as effectual as if engrossed herein.”

Feb. 17, 1831.

This deed was fortified by the usual clauses in entails, but no sasine was taken upon it. James predeceased without issue; and thereafter, in September 1781, the entailer executed an assignation and disposition of the rents in favour of trustees, for paying off his debts and recording the entail. He died in 1787, leaving the deed unrevoked and undelivered; and the trustees, having accepted and taken possession, caused the entail to be recorded on the 7th of October 1788.

The second son, Walter, obtained a precept of clare constat, but never made up titles to the estate, nor took possession; and, having become bankrupt, his assignees, under a commission of bankrupt, conveyed any right which he had for onerous causes to a trustee for behoof of his family. He died in 1802; and his eldest son, Robert Colquhoun the respondent, who was then in the West Indies, immediately came to this country, and was appointed by the trustees factor on the estate. Being about to return in 1805 to the West Indies, he granted a factory and commission to several gentlemen, (two of whom were trustees of the entailer,) proceeding on the narrative, that as he had not yet made up proper titles in his own person to the lands and estate of Camstraddan, therefore he granted “full power
 “to my said commissioners to make up and establish such
 “titles in my person, by general or special service or other-
 “wise, as heir to my said grandfather, as shall be thought
 “necessary to vest and complete a full right to the said lands
 “in my person.” No specific orders were given to make up his titles under the entail; but his commissioners were authorized to uplift the rents and apply the same, “in terms of the deed
 “of entail and bond of provision as relative hereto, executed
 “by the deceased Robert Colquhoun of Camstraddan, my
 “grandfather;” and power was given “to set tacks, consistently
 “with the said entail.”

Feb. 17, 1831.

In 1806, while he was in the West Indies, his commissioners expedite a general service in his favour as heir of tailzie and provision of his grandfather the entailer; and, in September of the same year, sasine was taken under the precept contained in the entail, and recorded in October thereafter. He returned to Scotland several years thereafter, and in 1820 obtained a precept of clare constat from the superior, Sir James Colquhoun, the appellant, authorizing him to be infeft as nearest and lawful heir of his grandfather, without reference to the entail.

In March and April 1826 a minute of sale was executed between him and Sir James, by which he sold to Sir James the estate at the price of £32,000 (of which £6,500 were paid); and authority was granted to Sir James to set aside the previous titles made up under the entail. In virtue of the precept of clare, the respondent was infeft on the 29th of April; and in the meanwhile the trustees of the entailer had been judicially exonerated and discharged.

Two questions then arose—1. Whether the titles made up by the respondent under the general service in 1806 were effectual? and, 2. Whether, on the supposition that they were not so, he had not homologated the entail, and so was barred from disregarding it, and availing himself of his rights under the contract of marriage? To try these questions two processes were brought, both at the instance of the appellant,—the one being a suspension as of a threatened charge on the minute of sale, and the other an action of reduction of the service and sasine in 1806 against the heirs of entail.

The respondent at the same time raised an action of reduction of the service and titles against the heirs substitute in the entail.

The Lord Ordinary having reported the cases to the Court, their Lordships in the suspension found the letters orderly proceeded, and in the reductions decerned in terms of the libel, reserving the rights of the heirs of entail in regard to any claim which they might have against the respondent as to the application of the price.*

Sir James Colquhoun appealed in the suspension; but as the judgment was in his favour in the reduction instituted by

* 7 Shaw and Dunlop, No. 94. On pronouncing judgment, *Lord Balgray* observed, The title is quite inept. The eldest son was the disponent and institute, and therefore a personal fee was vested in him. The service ought consequently to

him, and as he was no party to the other reduction, he could not appeal in them; and no appeal was entered by the other parties. Feb. 17, 1831.

Appellant.—By the structure of the entail, the respondent's grandfather, reserving his own liferent, and a power to revoke or alter, disposed the estate to his eldest son James and the heirs of his body; whom failing, to his second and other sons successively in the same terms; whom failing, to his eldest and other daughters successively and other substitutes.

James Colquhoun, the first disponee or institute, predeceased his father without issue, and no title was made up under the entail till the present respondent did so by the service in 1806. He was served heir under the entail to his grandfather the entailer; whereas the Court of Session held, that he ought to have been served heir to his uncle James, the disponee or institute under the entail.

But it is absurd to say, that a party can acquire an estate by serving heir to a person who never had it. The entail during the life of the entailer was a mere deed of settlement or testamentary deed undelivered and revocable. James Colquhoun, having died without issue before the entailer, took nothing, and was vested in nothing by the deed of entail; so that by serving heir to him nothing could be transferred to any successor.

It is, no doubt, said, that Scottish deeds of settlement of land estates are all of necessity dispositions de præsenti, or expressed in terms of instant alienation, although, by keeping them undelivered, and inserting a reservation of the granter's liferent and power to alter, the means of defeating them may be retained by the testator. This, however, amounts to an admission that they effectually convey nothing till after the death of the testator. On that footing it would have been idle for the respondent to serve heir of entail in the lands of Camstraddan to his uncle

have been to him, and not to the entailer; and therefore that which has been expedited is invalid.

Lord Craigie.—I consider the title made up by Robert Colquhoun, the grandson, to be inept and invalid.

Lord President.—I am of the same opinion. Robert the entailer no doubt remained fidei to the effect of having reserved rights which he might have exercised; but he did not exercise them; and as he disposed the estate to his son, the fee was vested in him.

Feb. 17, 1831. James Colquhoun, who never had right to these lands; on the contrary, he acted rationally and legally in serving heir to his grandfather the entail, by doing which he became bound to fulfil all the grandfather's deeds, including the settlement by entail which the grandfather executed.

Respondent.—The title expedite in 1806 was plainly invalid and inept, for various reasons; but particularly because, by the form and conception of the deed of entail, the personal right to the fee of the estate was exclusively in James Colquhoun the institute; and consequently the only habile mode by which the respondent, or any other substitute, could have connected himself with the entail, and taken up the estate under that deed, was by service to James the institute,—not by service to Robert the granter, whom the deed of entail by its form and conception divested, and in whom no right remained to be carried, or taken up by service as heir of entail.*

The House of Lords ordered and adjudged, “ That the cause
 “ be remitted back to the Court of Session, to review generally
 “ the interlocutor complained of, &c.: And it is further ordered,
 “ That the Court to which this remit is made do require the
 “ opinion of the other Divisions and of the Lords Ordinary, in
 “ writing, in regard to the law, and to the practice of conveyancers,
 “ in Scotland, in the services of heirs; and whether, according to
 “ such law and practice, the service in this case of the 21st
 “ August 1806 by Robert Colquhoun of Camstraddan, as heir
 “ of tailzie and provision to his grandfather Robert Colquhoun,
 “ the maker of the entail of 1774, was a valid service, or whether
 “ such service should have been to James Colquhoun the insti-
 “ tute in the said entail, who predeceased his father, the granter
 “ thereof, or to any other and what person ?”†

* Several other pleas were maintained, unnecessary to be noticed, except that the respondent contended, that the title made up in 1806 stood reduced by a final judgment of the Court of Session unappealed from.

† Under this judgment the Court of Session having ordered cases on the points remitted, the following opinions were given :

Lords Justice-Clerk, Glenlee, Cringletie, Meadowbank, Mackenzie, Corehouse, Medwyn, Newton, Fullerton, and Moncrieff, returned the following opinion :—Robert Colquhoun, by a disposition and settlement executed in 1774, conveyed his estate of Camstraddan, under the fetters of a strict entail, to his eldest son James Colquhoun, and the heirs whomsoever of his body; whom failing, to his second son

Walter Colquhoun, and the heirs whomsoever of his body ; whom failing, to a series of substitutes. The disposition contained procuratory of resignation and precept of sasine. Feb. 17, 1831.

James died before his father, without heirs of his body. Walter survived his father, but died without making up a title to the estate, leaving a son (Robert). Robert the younger attempted to make up a title by a general service as heir of tailzie and provision to his grandfather under the disposition 1774, in virtue of which he was infeft on the precept it contained. We are clearly of opinion, that by the law of Scotland, and according to the practice of the best conveyancers, the service of Robert was not a valid service.

By the law of Scotland there are two modes in which rights of this nature may be transmitted, namely, by inheritance on the one hand, and by grant or conveyance on the other. When rights are inherited, a title is completed to them by service — a form equivalent to the *aditio hæreditatis* of the Roman law ; and without service, or certain proceedings which in some cases may be substituted for it, the right does not pass to the heir, or vest in his person. When rights are conveyed, the conveyance itself constitutes the title, and vests the subject, except in so far as it requires to be feudalized (a point not now under consideration) ; and there is no room for service on the part of the grantee, because he inherits nothing from the granter.

In the present case, Robert the entailer might have disposed the estate to himself ; whom failing, to his son James and the other members of the destination ; a form of conveyance extremely common. If he had done so, he himself would have been the institute or immediate grantee, and on his death the substitute entitled to succeed must have taken up the right by service to him ; but, instead of instituting himself, he disposed to his eldest son James as the institute, who, if he had survived, could not have served heir to his father ; but being, by virtue of the conveyance, in full right as grantee, he could have proceeded at once to execute the procuratory, or take infeftment on the precept contained in it. On the same principle that a service by James to Robert would have been inept, so a service by any other member of the destination to Robert must be inept also, there being nothing in his *hæreditas jacens* to which it could apply.

The opinion now given is confirmed by the express authority of Mr. Erskine, iii. 8. 73, by the decision in the case of Mercer, to which he refers, and by the recent case of Dennistoun, Feb. 5, 1824.

It is true that Robert the entailer reserved his own liferent, with power to revoke the entail and sell the estate ; but neither these reservations, nor any other that can be imagined, could make him the institute in the entail, or render effectual a general service to him by his grandson Robert, or any one else, as heir of provision under that settlement. The feudal fee of the estate remained in him, notwithstanding the execution of the entail with the benefit of all those reservations ; but that fee could be taken up only by a special service expedite by the heir of line, or by infeftment in his favour on a precept of clare constat ; and the person so completing a title would have been proprietor in fee-simple, though he might afterwards have been compelled, by an action at the instance of those having interest, to bring the estate under the fetters of the entail.

Accordingly the general service of Robert Colquhoun, and the infeftments which followed upon it, were reduced, and we think rightly reduced, in the actions brought for that purpose at the instance of the suspender.

But if the service of Robert Colquhoun was invalid, the whole question between the parties in this suspension is exhausted, and it follows that the interlocutor under appeal is well founded.

But we are required by the remit to say, not only whether the service of Robert

Feb. 17, 1831. Colquhoun to his grandfather was a valid service, but "whether such service should have been to James Colquhoun, the institute in the said entail, who predeceased his father, the granter thereof, or to any other and what person." As to this point, it appears to us, that if there was an actual delivery of the disposition and settlement 1774 to James the institute, or to any person for his behoof, or if there was any thing which the law holds as equivalent to delivery, so that a right vested in James during the lifetime of his father, (an inquiry in law and in fact not fully entered into in the pleadings, and into which it was unnecessary to enter, not being relevant to the merits,) then the right so vested in James was a right of inheritance in respect of the remaining substitutes, and it would have been necessary for Robert to expedite a general service as heir of provision to James; but if, on the contrary, there was neither delivery to James, nor any thing equivalent to delivery, we are of opinion that no right vested in James, and that a service to him by Robert the younger would have been as invalid and inept as the service was which Robert expedite to his grandfather.

To explain the mode in which a title ought to have been made up by Robert, and assuming that no right vested in James by delivery, it will be remembered that Walter was instituted conditionally on the failure of James and the heirs of his body. If Walter himself, therefore, who survived the entailer, had intended to complete a feudal title in his person to the estate, he ought to have proceeded, not by service, but by an action of declarator in the Court of Session against all having interest, concluding to have it found that he was conditional institute in the entail; that the condition was purified by the death of his brother James without issue, and therefore that he was entitled to take infeftment in that character. The decree of the Court in that action would have been a warrant authorizing the notary to give sasine upon the precept, without which, in consequence of the act 1693, c. 35, relative to the deduction of titles, the notary might not have been in safety to expedite the infeftment. The decree, it is obvious, would not have vested the right to the precept in Walter, for it had been previously vested by the grant itself; but the decree would have furnished the notary with evidence of the fact, which it was incumbent on him to state in the instrument of sasine. On Walter's death, without completing a title, his son Robert in like manner ought to have obtained decree, that the right had vested in his father by his survivance of the entailer, and the failure of James and his issue; and he ought then to have expedite a general service as heir of provision to Walter, which would have put him in right of the procuratory and precept contained in the entail. Other modes of making up a title might have been followed, but what has been stated we consider to be the most correct.

If the subject appears to be attended with any difficulty, it arises from the following circumstances:—A practice, not very correct, but sometimes convenient, has prevailed, of using a service, not as the form of transmitting a right from the dead to the living, its primary and proper purpose, but as a substitute for a declaratory action to ascertain facts relative to the succession by the cognition of an inquest, instead of the decree of a Court. It is to this that Lord Kilkerran alludes in reporting the case of Gordon of Carlton. The destination was to the male issue of James Gordon the entailer; whom failing, to John Gordon and his heirs male; whom failing, to Nathaniel Gordon;—and John Gordon, the conditional institute, having predeceased the entailer, who left no male issue, it was held that a service to him by Nathaniel Gordon, the next conditional institute who survived the entailer, was inept; for, as the reporter rightly observes, there was plainly no right in John which could be carried by service; but Nathaniel served to the entailer, and that was held sufficient—not certainly because the service transmitted any right from the entailer to Nathaniel, but because it afforded evidence that both the entailer and John

Gordon had died without male issue, and consequently that the conditional institution in favour of Nathaniel had taken effect. On the same footing, if Walter Colquhoun, in the present case, being the second son of the entailer, had served to his father, it might have been considered as equivalent to a decree, that his elder brother James and his issue had failed before the entailer, and therefore that he was in titulo; but Walter having died without any proceeding of this kind, it was incompetent for his son Robert to serve to the entailer, because it was incumbent on him first to establish by decree that the right had vested in Walter, and, secondly, to take it out of Walter's *hæreditas jacens* by service to him.

Feb. 17, 1831.

This subject has also been perplexed by a doctrine maintained in the Case for the respondent, and which at one time received some countenance in practice—namely, that a disposition not delivered to the grantee, or for his behoof, vested a right in him, even in the granter's lifetime, which required to be taken up by service, though he predeceased the granter. We think that this doctrine is not consistent with legal principle, and that it would lead to anomalous and mischievous consequences. It assumes a right to be vested which the grantee has not accepted, and which he has the power to repudiate—of which he may be absolutely ignorant, which may infer burdens he would never consent to undertake, and which confessedly can neither be alienated by himself nor attached by his creditors. Neither the case of Lord Strathnaver, nor that of Campbell, which the respondent quotes, can be held as precedents in point; for in both the argument, that the service to the predeceasing institute was valid, was maintained, with this alternative, that assuming it to be otherwise, the right of the next member of tailzie as conditional institute (or creditor, as it was termed,) vested without a service at all; and the judgment of the Court in neither case distinguishes on which ground it proceeds. In Lord Strathnaver's case, Kilkerran, a counsel in the cause, mentions in his argument that the service was held to have been properly expedited; but Kames, in reporting the decision, represents it as a case of conditional institution. On the other hand, in Campbell's case, from the terms of the disposition, the service, which was in the character of heir-male, and not of heir of provision, was clearly equivalent to decree of declarator that the condition of the institution had been purified, and as such it is expressly relied upon by the party.

But although those two decisions, which are ambiguous, had been directly in point, they never could have outweighed the mass of precedent and authority on the other side, part of which is quoted in the argument in *M'Kenzie v. M'Kenzie*, Nov. 24, 1818, and much more could easily be adduced.

But it is proper to repeat, that our opinion with regard to the validity of a service by Robert Colquhoun to his uncle James is given only in consequence of the terms of the remit by the House of Lords. It cannot in any way affect the question at issue between the parties in this cause.

When this opinion was returned, the cause was again advised by the 1st Division, and Lord Balgray delivered the unanimous opinion of that Division:—The question remitted for us to consider is, "Whether, according to our law and practice, the service of the 21st of August 1806 by Robert Colquhoun of Camstraddan, as heir of tailzie and provision to his grandfather Robert Colquhoun, was a valid service; or whether such service should have been to James Colquhoun, the institute in the said entail, who predeceased his father, the granter thereof, or to any other and what person?" In the law of conveyancing this is a most important question; and if it be meant to regulate the making up of titles to heritable property in future times, it would require a most extensive and accurate inquiry into practice. In the present case its determination is of little importance, as the judgment of the Court is now

Feb. 17, 1831. irrevocable*, and a *res judicata*; and, of course, whatever may be the opinion of the Court on the question, it can only be a hypothetical opinion, declaring, somewhat anomalously, what should be the law and practice. If such be so meant, then I humbly think that the service of 21st August 1806 was not a valid service, and that the service should have been to James Colquhoun, the institute in the entail, although he predeceased his father, the granter thereof, and that it should not have been to any other person.

Before assigning the reasons for such an opinion, it is proper to premise, that if there existed no peculiarities in the conveyance of heritable property according to the feudal form, and if the transmission of such from the dead to the living were open to the regulation of the principles of general law, the question would assume a very different aspect. If our feudal conveyances were permitted by the law to assume the nature of testamentary deeds, then predeceasing disponees would be held as non-existing persons, and so opening the way to those who followed them, and existing as conditional institutes. But this is not the form of our feudal conveyances. All such grants must be executed in words *de præsenti*, and are understood to be complete the day they are dated. It is that consideration which induces me to think that the service should have been to the institute. 1. Although Robert Colquhoun, the grandfather, died last vest as of fee in the feudal estate, it never was vested in him on this entail. 2. Although, in this entail, this Robert Colquhoun, the granter of it, reserved his own liferent of this feudal estate, and power to sell, &c., yet, by the dispositive and governing clause of this deed, he disposed the estate, *per verba de præsenti*, to James Colquhoun *nominatim*, with procuratory of resignation and precept of *sasine* for vesting this feudal estate directly in this James Colquhoun, *nominatim* disponee. 3. Every disposition of feudal estate, a *habente potestatem*, to a *nominatim* disponee, *per verba de præsenti*, does in law convey to that disponee a legal estate, which may lawfully be vested in such disponee by immediate infeftment, if the disposition be delivered. Although the disposition be not delivered during the life of the granter, he is nevertheless presumed in law to have intended and done what he declares himself, by his own complete and uncanceled deed, to have done, and this *a fortiori*, if in that deed he has dispensed with the delivery of the same. 4. The *nominatim* disponee, James Colquhoun, being alive at the date of the deed, did thereby immediately acquire a legal estate, which might have been legally inherited by the heirs of his body, if he had died on the morrow, leaving an heir of his body, and such heir might have been legally and effectually served heir of tailzie and provision to this his immediate ancestor James Colquhoun, and thereby would have been entitled to the legal estate disposed to James by this deed, and to the therein contained procuratory and precept, and thereon he might have been lawfully infeft. (See 1693, c. 35.) 5. To say that the fee remained in Robert Colquhoun, the tailzier, is merely to say that his infeftment of fee remained the last infeftment, because none had yet followed on his procuratory or precept, and he remained in the dominion of the estate by not delivering his dispositive deed; but all this is nothing to the purpose in the question of making up the feudal title, under this dispositive deed, after his death. The quality of his right is not at all in question. 6. Any service to Walter Colquhoun, or to any other substitute as heir of tailzie and provision, would have been inept and useless. Such a service would not have constituted legal certainty that the institute James Colquhoun, and the heirs whatsoever of his body, had failed. The only legal certainty that this James, and the heirs whatsoever of his body, had failed, was by

* In the relative action of reduction.

service as heir of tailzie and provision to this James. A service as heir of tailzie and provision to Robert Colquhoun, the tailzier, never could be a title to the unexecuted procuratory and precept in this tailzier's own deed. He had not disposed to himself, nor had he granted any procuratory or precept for infefting himself. Either this his deed was of some legal effect or of none. If of none, there is an end of the whole case on both sides, and the fee-simple title made up must be good; but if this deed of the tailzier was of any legal effect, it was a disposition, procuratory, and precept for infefting James Colquhoun, the nominatim disponee alive at the date of this deed, and, failing him, the heirs of his body.

Suppose that this James had left an only child or eldest son, therefore the heir of this James's body, could this status, or quality of relation of this child to this James, ever be proved, or be of legal certainty, by service of this child as heir of tailzie and provision to Robert Colquhoun the tailzier? Most assuredly not. Conveyancers never heard of a declarator of a nominatim disponee or institute having failed. Such a practice never has existed, and such new form of procedure ought never to be resorted to, and is dangerous, as it would tend to perplex and unsettle land-rights. The legal answer to such procedure would be, "The party must produce the legal certainty that the predecessor died at the faith and peace of the king; and this can only be done by the verdict and service as a brieve in due form of law. For aught that appears, the nominatim disponee may have died attainted of high treason, or he may be still alive." In short, the law believes a service, and believes nothing else in such cases; and the law bestows peculiar privileges on it. It will not do to say, that, in the proof to the inquest on the service of the substitute as heir to the tailzier, the substitute may bring proof that the institute is dead. Any such proof, supposing it admissible, would not appear on the retour, or, if it did, it would only be obiter or incidental. Still the service would not be to the institute or nominatim disponee, but to the tailzier or disponer, and never could be a mid-couple to take up the open procuratory and precept according to the act 1693, c. 35, nor to take up any title or right whatsoever.

The process of declarator is a most useful proceeding in the law of Scotland, particularly for ascertaining the right of parties under complicated settlements and manifold titles; but that process never has been used, nor ought to be used, nor can be used, as a substitute for a service, where such service is the legal mode of transferring the right. The general service was hitherto used and resorted to for that end, and was useful in a declaratory way, without the least intention of taking up or transmitting any thing. In this point of view, the judgment in the case of *Ramsay v. Sir Alexander Cochrane* * is to be lamented. It is the more to be regretted, as there is no record of 'general services; and at this time, since that judgment, no conveyancer, however accurate or however careful, can tell whether he has made up a correct title for his client.

This is a feudal question, not one of mere general law, and it relates to the transmission of heritable property according to the peculiarities of the law of Scotland, and ought to be considered with the greatest attention. In such matters, whatever tends to unhinge long-established form and usage is constantly attended with dangerous consequences. The case of Lord Strathnaver I consider of great authority; and I look upon the law, as laid down by Lord Arniston in his paper, as correct.†

The doubt which has arisen in another place seems to have been, "whether

* See Vol. IV. No. 21.

† One of the cases quoted by the suspender, along with a pleading by Mr. R. Dundas, afterwards Lord Arniston.

Feb. 17, 1831. any legal estate could be constituted or conveyed to the institute by the deed in question, he having predeceased the granter, the tailzier; and consequently, whether there could be any legal estate to be taken by service as heir to the institute." But, with great deference, there was constituted and conveyed to the institute by his deed the legal estate of fee, legally capable of being feudally vested by infestment, although qualified with the reservation of the granter's liferent, and of power to sell, &c.; and the legal estate, thus constituted and conveyed to this institute, might be taken up by service as heir to the institute; and such service was the only legal certainty that the institute had failed—that is, had died; and that thus the open procuratory and precept had become transmissible according to the act 1693, c. 35.

In this question it is no less to be borne in mind, that all dispositions, or deeds conveying heritable rights, must be conceived in words *de præsenti*, and are full and complete deeds from the date of execution, whatever qualities or conditions they may contain. Again, by the practice of our law, it should also be remembered, that where various persons have various and different rights, the one having the principal or catholic right is understood, and justly so, to be custodier for the whole. A liferenter, particularly one by reservation, as the entailer remained after executing the deed of entail, keeps the whole for the *fiar*. As it stands, the question is merely hypothetical, and can be intended merely as a declarator of the law in future; but as it may have a great influence, prospectively, on Scottish conveyancing, it is important that our opinions should be promulgated.

His Lordship further stated, that he expressly dissented from some of the principles laid down by the consulted judges.

Jameson for Suspendor.—I understand that no point is intended to be decided, except that the general service as heir of entail, which Robert Colquhoun junior expedite in 1806 to his grandfather the entailer, was a bad service; and that the proposed judgment does not involve the question whether the service as heir of entail ought to have been to the institute James.

Lord President.—Certainly not. In compliance with the remit from the House of Lords, the Court have taken the opinions of 'the other judges on the questions there set forth. We have also delivered our own opinion on these points; and in further compliance with the same remit, which directs us thereafter to proceed as may be just, we adhere to our former judgment, and refrain from deciding a separate question, which, in the opinion of the whole judges, is unnecessary to the final and complete disposal of this cause,

The Court then (8th July 1831) pronounced this interlocutor:—"Having advised the Cases, &c., with the opinions of the consulted Judges, &c., of new
"repel the reasons of suspension, find the letters orderly proceeded, and decern; find
"no expenses due to either party under the remit from the House of Lords."

Appellant's Authorities.—*Maconochie*, Jan. 12, 1780 (13,040); *Baillie*, Feb. 23, 1809 (F. C.); *Turnbulls*, Nov. 12, 1822 (2 Shaw and Dun. 1*); *Donaldson*, March 11, 1786 (8,689); *Campbell*, Dec. 14, 1790 (8,652); *Lockhart*, Feb. 19, 1819 (F. C.); *Mackenzie*, Nov. 24, 1818 (F. C.†); *Hamilton*, March 3, 1815 (F. C.); 3 *Ersk.* 8, 23, and 38; *Hepburn*, June 6, 1814, (2 *Dow.* 342); *Russel*, Jan. 31, 1792 (10,300); *Douglas*, Feb. 22, 1765 (15,616); 3 *Ersk.* 8, 73; June 30, 1758 (14,369); *Campbell*, Nov. 28, 1770, (14,949); *Sandford on Entails*, 323.

* Reversed on the 15th of April 1825. See Vol. I. No. 12.

† See 1 Shaw's Appeal Cases, p. 150.

Respondent's Authorities.—Strathnaver, 2 Feb. 1728 (15,875); 3 Ersk. 8, 73; Feb. 17, 1831.
 Gordon, Feb. 14, 1749 (15,384); Campbells, Nov. 28, 1770 (14,949); Baillie,
 Feb. 23, 1809 (F. C.); Dyke, July 3, 1813 (F. C.); Mackenzie, Nov. 24,
 1818, (F. C.)

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL,—
 Solicitors.

JAMES HUME and others, Appellants. *Lord Advocate (Jeffrey)—* No. 5.
Walker.

WILLIAM DUNCAN, Respondent.—*Sandford—A. M'Neil.*

Prescription—Title to exclude.—Where a proprietor of heritable subjects granted an ex facie absolute disposition, on which infestment was taken, qualified by a back bond containing a power of redemption within eleven years; and he assigned this bond to a third party, and disposed the property to him; and the assignee, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee acquired right to the assignation and relative action, which he afterwards wakened—Held, in an action of reduction on fraud and incapacity, (affirming the judgment of the Court of Session,) that although more than forty years had elapsed from the date of the above deeds, yet a prescriptive title had not been obtained, so as to exclude a challenge by the heir.

JAMES DUNCAN bought, as was alleged, for £600, certain Feb. 18, 1831.
 heritable subjects in the Kirkgate of Leith, under a disposition
 on which he did not take infestment; but requiring, in order to
 pay them, a loan, he executed, on the 4th of September 1771,
 an ex facie absolute disposition in favour of John Watson, with
 assignation to the unexecuted precept on which Watson was
 infest on the 19th (recorded on the 20th), and Watson on the
 same day granted a back bond, declaring, that “albeit the said
 “disposition does bear to be an absolute and irredeemable right
 “of property to the said tenement and pertinents, I hereby
 “declare that the same is redeemable and may be redeemed at
 “any time within the space of eleven years from the date hereof,
 “upon payment of the sum of £150 sterling,” the sum advanced
 to Duncan.

1st Division.
 Lord Meadow-
 bank.

Thereafter, in 1773, Duncan entered into a transaction with
 Robert Hope, by which he bound himself, “his heirs and suc-
 “cessors, to grant a full and ample disposition, containing all

Feb. 18, 1831. “ the requisite and necessary clauses, and to free and relieve the
“ subjects after mentioned (the above premises) of all debts and
“ encumbrances ; and, being so disencumbered, to grant the said
“ disposition to and in favour of the said Robert Hope, his
“ heirs and assignees,” of the subjects in question ; and he thereby
not only de præsenti disposed these subjects, but also assigned
the back bond by Watson, and acknowledged that “ the price
“ instantly paid me by the said Robert Hope, together with the
“ obligation hereafter mentioned, wherein he becomes bound to
“ relieve me of the debt due to John Watson, is a full and
“ adequate price for the subjects above mentioned.”

On the other hand, Hope bound himself to relieve Duncan of the debt due to Watson.

Hope assigned his right under this deed to Tod, as trustee for his creditors ; and in 1782 Tod raised an action of redemption against Watson, in which an interlocutor recalling a decree in absence was pronounced in July 1783 ; but the process afterwards fell asleep, and Watson died in the same year.

By a deed of settlement Watson conveyed the subjects to his son Samuel, who disposed them to his brother James. James was infest on the 27th of January 1787, and in 1792 he disposed them in trust to Hume, for behoof of his children. After the death of James Watson, Hume, on the 11th of May 1816, expedite a charter of resignation and confirmation.

In 1821 Tod awakened and transferred the process of redemption against Hume as trustee and against the representatives of John Watson. William Duncan, having obtained himself served heir in general to his father, brought, in January 1823, an action of reduction of the disposition in 1771 to Watson, and also of the assignation to Hope, on the ground of fraud, incapacity, and blindness.

In defence, Hume, as trustee of Watson, founded upon the absolute disposition and sasine in favour of Watson in 1771, with forty years' possession, as sufficient to give him, in virtue of the positive prescription, a right to the property ; and, on the lapse of that period, as sufficient, by the negative prescription, to extinguish the back bond containing the obligation to reconvey. Tod, as in right of Hope, in like manner founded upon the absolute conveyance in the deed 1773 as exclusive of the right of the respondent ; and both parties therefore declined to satisfy the production.

Pending this action, Hugh Watson (one of the representatives of the original disponee, John Watson,) acquired right from Tod to the deed in favour of Hope, and maintained the same pleas as Tod. The pursuer admitted that his father had received £150 from John Watson in 1771, and £100 from Hope; but he alleged that the sum which Hope ought to have paid was £400. Feb. 18, 1831.

The Lord Ordinary found, “ that the pursuer’s (respondent’s) “ title to insist is excluded by the operation both of the positive “ and of the negative prescription; and therefore sustained the “ title to exclude founded on by both defenders,” and dismissed the process. The pursuer reclaimed, and the Court having observed, that although he admitted the receipt of the £150 and £100, he concluded for reduction in toto, he proposed to amend the conclusions. The Court therefore recalled the interlocutor in hoc statu, and remitted to the Lord Ordinary to receive a supplementary summons. The pursuer then raised a supplementary action of declarator, to have it found that the above deeds were truly held only as securities, and concluding for count and reckoning, under deduction of the above sums. The Lord Ordinary conjoined it with the reduction, and then reported the case to the Court, who, on the 26th February 1829, “ repelled the defences “ stated by the defenders, arising from an alleged exclusive title “ to satisfy the production, remitted to the Lord Ordinary to “ proceed accordingly, and found the defenders liable to the “ pursuer in payment of the expenses of the present discussion*,” and which expenses were afterwards modified, and decerned for.

Hume, Tod, and Watson appealed.

Appellants.—The deed of 1771, and sasine thereon, vested in John Watson a sufficient title to acquire an absolute title by prescription, so as to exclude all extrinsic objections. In virtue of this title he and his successors possessed the subjects unchallenged till 1821; so that more than forty years had elapsed. The title is therefore rendered free from all exception by the positive prescription. Again, the back bond, being a mere personal obligation, was extinguished by the effect of the negative pre-

* 7 Shaw and Dunlop, No. 243.

Feb. 18, 1831. scription. In like manner the deed of 1773 has been fortified by the positive prescription.

Respondent.—The sole question at present relates to a preliminary objection taken by the appellants to satisfy the production. They say, that because they have possessed on deeds ex facie absolute for forty years, it is not relevant to say that those deeds were acquired by fraud and deception ; but wherever a deed is challenged on that head it must be produced, and the party must enter on the merits, as to whether there was fraud or not. This was expressly so decided in *Sinclair v. Sinclair*.

LORD WYNFORD.—My Lords, so long ago as the 4th September 1771, James Duncan, the father of the present respondent, purchased certain houses, for which he was to pay £600. He had not at the time the £600, but borrowed £150 from John Watson, the father of one of the appellants, and made an absolute conveyance of the property to him, so that it appeared as if Duncan had obtained the whole consideration money from Watson. At the same time a back bond, that is, an instrument by reference to which the real nature of the transaction is to be understood, was given. At a subsequent period Duncan conveyed the estate and assigned the back bond to a person of the name of Hope, who contracted to pay off the debt due to the original mortgagee, and to pay an additional sum of £400. We have no means of knowing whether that £400 was paid or not. It is insisted, that although the consideration appeared to be £400, in point of fact only £100 was paid. It is also further stated, although we have not the means of knowing the fact, that Duncan was in a condition to have a fraud practised upon him—that he was perfectly blind, and an imbecile person. Upon these grounds his son instituted an action of reduction of all the deeds ; to this action it was answered, that the title of the pursuer is excluded by prescription. But the pursuer insisted, that, there having been fraud on the part of the other parties, prescription was no title to exclude ; and in looking attentively to the authorities on the case, it appears to me that he is not precluded by the length of time. The law of Scotland upon the subject of prescription seems quite settled by the cases of the Duke of Gordon and of *Sinclair*. It appears to me that the judgment of the Court below was right. I shall therefore beg leave to move your Lordships, that the judgment of the Court below be affirmed.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

Appellants' Authorities.—3 Stair, 1, 13, Stat: 1617, c. 12; 2 Stair, 12, 15; 3 Ersk. Feb. 18, 1831.
7, 8; 2 Bank. 12, 16; Younger, Nov. 28, 1665 (10,925); Murray, March 18,
1807 (10,721); Stewart, July 6, 1711 (10,722); Clerk, Jan. 27, 1746 (10,662);
Paul, Feb. 8, 1814 (F. C.); M'Donell, Feb. 26, 1828 (6 Shaw and Dun. 600.)
Respondent's Authorities.—Sinclair, July 4, 1781 (6,725); 2 Sandford on Heritable
Suc. 127.

RICHARDSON and CONNELL—J. DUTHIE,—Solicitors.

STEIN'S ASSIGNEES, Appellants.—*Knight—Sandford.*

No. 6.

BROWN and GIBSON-CRAIG, Respondents.—*Lord Advocate*
(*Jeffrey*)—*Solicitor General*—(*Kaye*).

Foreign—Homologation.—Held (reversing the judgment of the Court of Session), that
English assignees under a commission of bankrupt have no power to homo-
logate a trust-deed executed by the bankrupts in relation to their effects in
Scotland, which, it was alleged, fell under the commission.

JOHN STEIN, Thomas Smith, Robert Stein, James Stein, and Feb. 23, 1831.
Robert Smith, were partners of a banking company in Fenchurch-
street, London, under the firm of Stein, Smith, and Company; 1st Division.
and in Edinburgh under that of Scott, Smith, Stein, and Com- Ld. Corehouse.
pany. These firms were one and the same company, being
composed of the same partners.

John Stein, Robert Stein, and James Stein at the same time
carried on business in Scotland in partnership, as distillers at
Canonmills, under the firm of John Stein, and at Kilbagie
under that of Robert Stein and Company. On the 22d of
July 1812 the London banking-house stopped payment, and
four separate commissions of bankrupt were, on the 23d, issued
against Thomas and Robert Smith and Robert and James
Stein, who were then in London, but not against John Stein,
who was then in Scotland. The Edinburgh house also stopped
payment on the 25th.

In consequence of the stoppage of the banking establishment
the affairs of the distillery concern became embarrassed; and,
on the 3d of August, a meeting of the distillery creditors was
held at Edinburgh, when, it appearing that there were sufficient
funds to pay them, it was resolved that a trust-deed should be
executed in favour of Brown and Gibson-Craig, which accord-
ingly was done on the 6th by John Stein, as the acting partner

Feb. 23, 1831. of the distillery concern. On the following day he went to London, and on the 11th the separate commissions of bankrupt were superseded, and a joint commission was taken out against all the partners, including John Stein. The provisional assignee, along with the partners under their several firms, both as bankers and distillers, granted on the 22d a power of attorney to Gibson-Craig to take possession of the whole estates and effects in Scotland; and Cuthbert, Smith, and Duval, on their appointment as assignees, executed, on the 1st of September, a similar power in his favour. In neither of these deeds was any notice taken of the trust. On the 16th the partners, as bankers, executed in favour of the assignees a disposition and assignation of the effects in England and Scotland; and at the same time the partners in the distillery concern executed a similar deed, but in which it was declared that the execution of it should be without prejudice to the trust-disposition, of which the validity was to be determined at law.

In the meanwhile a meeting of the creditors in England had been called, “ in order to assent to or dissent from the said
“ assignees commencing, prosecuting, or defending any suit or
“ suits at law or in equity, or any other proceedings in England
“ or Scotland, for the recovery or defence of any part of the said
“ bankrupts’ estate and effects, or either of them, or the com-
“ pounding, submitting to arbitration, or otherwise agreeing
“ any matter, cause, or thing relating thereto; also to the assign-
“ nees paying the salaries or wages of the clerks or servants
“ of the said bankrupts, or either of them, in full; and other
“ special affairs.” A meeting was accordingly held on the 9th of September, when it was resolved to “ authorize and
“ empower the assignees of the said bankrupts’ estate and effects
“ to commence, prosecute, or defend any suit or suits at law or
“ in equity, or any other proceedings, in England or Scotland,
“ for the recovery or defence of any part of the said bankrupts’
“ estate and effects, or either of them, or to compound, submit to
“ arbitration, or otherwise agree to any matter, cause, or thing
“ relating thereto.”

At this time there was a large quantity of spirits in the warehouses of the distillery in Scotland, prepared for the English market; and it appeared that, on the supposition that the banking and distillery concerns were separate, there would be sufficient funds to pay the distillery creditors, and leave a reversion, which

Feb. 23, 1831.

would go to the liquidation of the debts due to the creditors of the banking establishment. The trustees proposed to send the spirits to London, and the assignees stated that they would dispose of them; but that, as they conceived the two establishments were identified, they would hold the proceeds for behoof of the party having right to them. The trustees declined to ship on this footing, and Gibson-Craig proceeded to London to have the question settled. While there, an agreement was entered into, on the 24th September, between him (on behalf of himself and Brown as trustees) and the assignees, that the spirits should be shipped to the assignees for sale, without prejudice to their respective rights. He then left London; and on the 26th the assignees addressed to him and Brown this letter:—

“ Being satisfied that the distillery concerns at Canonmills and
“ at Kilbagie were carried on by Messrs. John, Robert, and
“ James Stein, distinct from the concern in Fenchurch-street
“ under the firm of Stein, Smith, and Company, and that the
“ creditors of the distillery companies have a preference on the
“ effects belonging thereto, we hereby authorize you to pay the
“ distillery creditors the amount of their debts, taking care, in
“ the first instance, to ascertain the exact amount of such debts.
“ We beg leave to add, that the assignees of Messrs. Kensington
“ and Company also approve of your making such payments.”

The spirits were shipped to and disposed of by the assignees; and, on a representation from Gibson-Craig that some of the debtors to the distillery hesitated to pay, in respect that their debts were vested in the assignees, they, to obviate this objection, granted to him a power of attorney to receive payment of and discharge the debts. On the faith of the above arrangement the trustees proceeded to execute the trust, and to pay a dividend to the distillery creditors. The assignees insisted that Gibson-Craig was acting merely as their attorney, and ought not to have paid the dividend; and they recalled the power. An arrangement was afterwards entered into between the assignees and the distillery creditors, by which the latter renounced their claims on the distillery effects, on being paid 15s. per pound; and new trustees having been appointed, they brought an action of reduction of the trust-deed on various grounds, and concluded that the trustees should be ordained to count and reckon for their intromissions. On the other hand, the trustees raised an action of multiplepoinding and

Feb. 23, 1831. exoneration; and these processes having been conjoined, the Lord Ordinary directed the opinion of English counsel to be taken with reference to a plea of homologation maintained by the trustees, — “Whether, on the supposition that the letter
“from Messrs. Cuthbert, Smith, and Duval to the defenders
“ (trustees), dated 26th September 1812, is held to import an
“ authority to the defenders to settle with the distillery creditors
“ in the capacity of trustees, and of consequence to be a ho-
“ mologation of the trust-deed to that effect, such authority is
“ by the law of England binding on the creditors of Scott,
“ Smith, Stein, and Company, and on the present assignees,
“ the pursuers of this action, reference being had to all the
“ circumstances of the case, and in particular to the minutes of
“ the meeting of creditors held upon the 9th of that month?”

The record, together with cases for the parties, having then been laid before Mr. Rose, he delivered this opinion :

“ On the supposition that the letter from Messrs. Cuthbert,
“ Smith, and Duval to the defenders, dated the 26th September
“ 1812, is held to import an authority to the defenders to settle
“ with the distillery creditors in the capacity of trustees, and of
“ consequence to be a homologation of the trust-deed to that
“ effect, I am of opinion that such authority is by the law of
“ England binding on the creditors of Scott, Smith, Stein, and
“ Company, and on the present assignees, the pursuers in the
“ action, reference being had to all the circumstances of the case,
“ and in particular to the minutes of the meeting of creditors
“ held upon the 9th of that month.

“ With regard to the obligation of this transaction upon the
“ assignees in such their character as assignees, and individually
“ as creditors, there could not be a question either in law or in
“ equity.

“ With regard to the creditors generally, the question involves
“ a conclusion rather of fact than of law.

“ Assignees under a commission of bankrupt have the com-
“ plete legal authority and title, charged with a trust or duty to
“ use them beneficially for the purposes of the commission. They
“ are primâ facie fully competent to bind the creditors at their
“ (the assignees) own discretion, and without any previous or
“ express sanction, either of commissioners or of creditors, except
“ in those particular instances in which such sanction is required
“ by statute 6th Geo. IV. c. 16, § 88, viz. compounding with a

“ debtor, giving time, taking security, submitting to arbitration, Feb. 23, 1831 :
 “ and commencing suits in equity ; any other act relating to the
 “ property vested in or claimed by them, which an absolute
 “ owner or claimant may do, they may do effectually and con-
 “ clusively, provided it be for the benefit, or rather not to the
 “ detriment, of the creditors. Themselves at all events they bind ;
 “ and if no creditor or creditors come forward to complain, the
 “ act done is good to all intents and purposes both in law and in
 “ equity.

“ If the question were agitated in this country, it would stand
 “ thus :—Creditors, one or more of them, would complain, either
 “ in a court of equity, or to the equitable jurisdiction of the
 “ Chancellor in bankruptcy, that the assignees had abused their
 “ legal dominion, to the prejudice of the interests of such creditor
 “ or creditors. The *prima facie* legal validity of the transaction
 “ would be recognized ; the question would be, Is it detrimental
 “ or not to those on whose behalf the assignees have thus been
 “ acting ? Upon this question, as upon a matter of fact, the
 “ Court would direct a reference either to the Commissioners or
 “ to a Master in Chancery ; and, upon their returning yea or
 “ nay to such inquiry, would make its final adjudication. If this
 “ question were referred to me, or if in this case I am to be
 “ taken as exercising a similar function, I should, under all the
 “ circumstances of the case, without hesitation affirm, that the
 “ assignees and creditors were bound ; holding, 1. The assignees
 “ to be legally competent to homologate the trust-deed ; and,
 “ 2. That there was not in the mode of exercising, or in the
 “ circumstances attending such exercise, any incident upon
 “ which the creditors were entitled to disaffirm it.”

On resuming consideration of the case, the Lord Ordinary pronounced this interlocutor :—“ Finds it proved, that, by the
 “ law of England, the pursuers, as assignees of Stein, Smith, and
 “ Company, acting for themselves and the creditors of the
 “ company, had power to homologate the trust-deed executed
 “ by John Stein in favour of the defenders for behoof of the
 “ creditors of the distillery companies : Finds it proved, by the
 “ documents produced and facts admitted in process, that the
 “ pursuers did homologate that trust-deed to the effect of autho-
 “ rizing the defenders to realize and distribute the funds of the
 “ distillery companies, and for that purpose to ascertain the
 “ claims against the companies, and to settle with the creditors ;

Feb. 23, 1831. " that the defenders are bound to account to the pursuers for
 " their actings and intromissions only in the character and with
 " the privilege of trustees under the said trust-deed; and there-
 " fore assoilzies the defenders from the reductive conclusions of
 " the libel, and decerns; and in the multiplepinding appoints
 " parties to debate; reserving consideration as to expenses until
 " parties be heard in the multiplepinding."

Against this judgment the pursuers reclaimed; but the Court, on 2d June 1829, unanimously adhered.*

* 7 Shaw and Dunlop, No. 352.

The following notes of the opinions of the Judges were laid before the House of Lords :

LORD BALGRAY.—I have no difficulty whatever in this case. There is a great deal of law argued in these papers, and exceedingly well argued too; but it was quite unnecessary, for these points of law have nothing to do with the case.

I have directed myself to the facts of the case, and these are quite sufficient to settle this question. It is just as clear as sunshine that the banking concern and the distillery concerns were separate and distinct concerns, and that they were so ab initio. This is an important fact.

Another fact which strikes me forcibly is, that it is admitted that the distillery concern never was bankrupt, and never was declared bankrupt. There is therefore no question of law here. But let the law be as it may, I do most humbly think that John Stein acted the best and wisest part in granting the trust-deed to Mr. Gibson and Mr. Brown, for the purpose of winding up the concern. This was not only the best plan for the distillery concern, but the wisest for the bankrupt concern, in order that any interest which that concern had in the affairs might be managed at the least possible expense.

Now, that being the case, I need not go into all the after proceedings. In regard to the meeting of the creditors of 9th September, I think that meeting was called for the express purpose of deciding what was to be done with the distillery concern; and I cannot lay out of view the letter of the 26th September, which is quite conclusive in my mind. The assignees there admit that the two concerns were distinct; and there is another letter afterwards from Mr. Gibson, in which he ably and fully explains the whole matter as it stood. Parties were then put completely in the knowledge of their rights; and in such knowledge they did expressly homologate the trust-deed. After Mr. Gibson had thus explained the rights of parties, and of which they could not then be ignorant, the assignees grant a power of attorney to him. This shows that they well knew the situation in which they stood, and were thus supplying any defects in his rights, or removing any difficulty as to his powers (if such had existed), for settling and winding up the separate estate.

I therefore approve highly of the conduct of the trustees; and there is a letter of the 11th of June, which I cannot overlook, and in which the whole matter was explained. Neither can I lay out of view what is stated in the 14th page of the paper for the trustees, that they are, and have been all along, perfectly willing to do any thing not inferring a challenge of their actings under the trust-deed; but they maintain, and I think they maintain rightly and honestly, that the trust-deed shall be held valid in law. A different mode would be most unjust towards them.

Stein's assignees appealed.

Feb. 23, 1891.

Appellants.—The original assignees had no power to homologate the trust-deed; that deed was plainly invalid, and there is no authority, and no foundation in principle, for holding that the assignees had power to cure that invalidity by homologation. Assignees cannot compromise or relinquish any right or claim belonging to the bankrupt estate, or give any preference to a claimant over the funds, without directions to that effect of a general meeting of the creditors specially called for the purpose; but no such authority was given at the meeting alluded to, and which, besides, was a mere pro formâ meeting, always held at a certain stage of the proceedings under a commission. The respondents do not pretend that there was an authority given, at a meeting called on notice for that purpose, to consider this particular point; and, unless they say so, they make no advance in their case. What the assignees might have done, if authorized, is a different inquiry; but, on the point of law, it is clear that they had not the power to homologate. The authority of *ex parte* Whitchurch, 1 Atkyns, 91, is conclusive.

Respondents.—The deed was valid; at all events the assignees have homologated the deed, and cannot now challenge it. They had, in virtue of their office, power to homologate. They are vested with a legal authority to bind the creditors, charged with a trust, to use it beneficially for the purposes of the commission. Besides, here the creditors gave full power to the assignees “to compound, submit to arbitration, or otherwise agree to any matter, cause, or thing relating” to the bankrupt’s estate and effects. This being a point of foreign law, the opinion of counsel was taken, and the fact proved that the assignees

Upon the whole, then, I approve of the conduct of the trustees; and I think the interlocutor of the Lord Ordinary in every respect well founded.

LORD PRESIDENT.—Are any of your Lordships of a different opinion?

LORD CRAIGIE.—I concur entirely with the opinion delivered. It appears to me that the only object of this action is, that the trustees shall be treated in a different way from the assignees. This will never do.

LORD GILLIES.—I am of the same opinion. I concur entirely in the interlocutor of the Lord Ordinary, which I think puts the matter on a right footing.

LORD PRESIDENT.—I also concur. Perhaps, if the English Counsel had said that the assignees had no power to homologate the trust-deed, that might have given a different complexion to the business; but they admit that they have such a power, and I fully concur with your Lordships that they exercised this power.

Feb. 23, 1931. could homologate. The Court of Session, therefore, could not do otherwise than give effect to that opinion by assoilzieing the respondents; and as this House acts as a Scottish tribunal, it must be regulated in its decision by the same evidence.

LORD CHANCELLOR.—My Lords, in advising your Lordships in this case, I feel relieved from all doubt in my own mind upon some of the complicated questions and arguments that have been raised. I do not rest the judgment which I am now about to advise your Lordships to pronounce, upon them; they are not decisive of the present question, and I put them out of view. I come at once to what is evidently the foundation of this proceeding in the Court below, and which struck me as being the ground whereupon, I think, alone their Lordships rested or could rest in pronouncing this interlocutor, whether I look at the Lord Ordinary's first interlocutor, or to the judgment of the Court before which it was brought by review, or to the reasons given by the learned persons who unanimously pronounced the judgment. I find the Lord President expressly admits—and it is the only reference to the point—that if the law of England touching the power of assignees were other, or should turn out to be other, than it had been represented to him to be, it might alter the complexion of the case. My Lord Corehouse, plainly and explicitly, and in terms, rests it upon the law of England. This House is both a Court of Scotch law and of English law, and can import into its decision of a Scotch question its knowledge—which it must judicially act upon—quasi a Court of Appeal of the English law. No doubt, if it is a question entirely of Scotch law, the House, though ever so knowing in English law, ought not to suffer the English law, or its principles, to modify the Scotch law; and the judge, sitting here as a Scotch lawyer upon a Scotch appeal, does an inaccurate, illogical, and illegal act, if he permits his English law feelings or principles to sway him at all in deciding a Scotch question: For instance, if a judge, deciding upon the Scotch law of entail, which proceeds upon principles entirely different from the English law, was to allow, as has been done, his knowledge of the English law and its principles to come across his mind, and influence his judgment, in pronouncing a decision upon the Scotch law of entail, he would do an inaccurate, an illogical, and, I think, an illegal act. But the question is different here, where the English law is the question—where the question raised in Scotland was, What says the English law? There it was a question of fact; there it was to be ascertained, as a question of fact must always be ascertained, by evidence; and that evidence coming from English statutes to the Scotch Court, and with the lights that they

Feb. 23, 1851.

had, and the only lights that they could have, they would have done an inaccurate, illogical, and illegal act, if they had allowed their minds to be prejudiced by any other representations than by the evidence of that law. But how stands the matter when we come into the Court of Appeal, where the judges are English lawyers as well as Scotch lawyers? Is it not a refinement and subtlety to hold, that they must draw a line in their minds and say, "Though true it is, we all know what the English law is—we are here not as English lawyers, but as Scotch lawyers—we must paralyze one-half of our mind, and throw it into a state of utter darkness; we must only look to the light shed as to the English law in the mind of a Scotch lawyer." But here the mind is the same—it knows the English law. The judge cannot dismiss from his mind what he knows the English law to be, and of which he is bound to take notice, not to shed a deceitful and misleading light upon Scotch law, which is different; but where the only question is, What is the English law? he cannot shut out that judicial knowledge. That may be a consequence of having a question coming from a Scotch law Court, by appeal, to a Court not composed of Scotch lawyers, but of English and Scotch lawyers. The Consistorial law to the Common-law Courts is a foreign law. The Ecclesiastical Courts act under that law. It is their code, as the statute and common law is ours; and we import the civil law, as a matter of fact, into our Common-law Courts. The practice, well known formerly, and often resorted to by the common-law judges, was, to write to the bishop or his officer, the consistorial judge, to certify what, upon a certain point, the ecclesiastical law provides; and they are bound by that: such is held to be the rule of the Courts. Then we will suppose there could come before the Court of Delegates an appeal, to make it like this case, where there has been manifestly something wrong decided somewhere: would not the Court of Appeal, consisting of common-law judges, with civil-law judges; would not the Dean of the Arches, for example, if sitting there, feel himself called upon to state to his brethren of the common-law Courts, "All this is wrong?" Would he not at once reject the subtlety interposed between them and a right decision? Would he ever think of saying, "Though true it is we are the consistorial judges in this Court as well as the common-law judges—though true it is our minds are illuminated by all our knowledge as civil and as common lawyers—and though our chief office is to see that justice should be done, and prevent subtleties and technicalities from leading to gross and manifest error; yet I, who am both a civil lawyer and a common lawyer, will not listen to what I know, as a judge of the civil law, to be a manifest error, which has been certified to the Court of King's Bench?" He

Feb. 23, 1831. would say, on the contrary, "No man can blame the Court of King's Bench, which had not the light I have, for being led by the light they had; but I am bound to set them right." Then, that point being disposed of, there only remains to consider whether that deed is invalid, upon the ground that it purports to bind the partners in their partnership concerns, whereas this was not any partnership business; and also as being reducible upon the old Scotch Act. The Lord Ordinary presumes it was invalid, or it would not require homologation; and in fact he puts it upon the homologation. Therefore, admitting it to be invalid by itself, which I think it is, has it been homologated? I will assume it has, as far as the assignees had the power. But could they by any act homologate and give force to a deed which they could not validly have executed? If they could not have executed the deed, could they give it validity when it was invalidly executed, or could any other persons acting for them do so? That is so clear as to require no argument. Then, was it originally a valid deed? No, it was not, unless ex-parte Whitchurch has ceased to be law (and unless I am to invent a new law to get rid of ex-parte Whitchurch, which has been acted upon and adopted by the assent of all the judges). Then, acting upon it, I am bound to hold that the assignees had not power to homologate what they could not have executed. I would therefore propose to your Lordships, in consistency with what I have now stated, that this cause be remitted to the Court of Session, with the instruction to which I have adverted—that they are to assume that the assignees had no power to homologate. They have proceeded upon the statement made to them that the assignees had the power—they will now proceed further as they shall be advised, but upon the supposition that the assignees had not the power.

The House of Lords declared, That the assignees of Stein, Smith, and Co. had no power to homologate the trust-deed executed by John Stein in favour of the respondents, for behoof of the creditors of the distillery companies; and it is therefore ordered and adjudged, That the several interlocutors complained of be and the same are hereby reversed; and it is further ordered, That, with the said declaration, the cause be remitted back to the Court of Session, to proceed therein as shall be just.

Appellants' Authorities.—3 Ersk. 3, 20; 2 Bell, p. 618; Miller, Jan. 22, 1811 (F. C.); 2 Espinasse, 523; 1 East, 48; Strother, July 1, 1803 (App. Forum competens); Royal Bank, Jan. 20, 1813 (F. C.); 2 Dow, 230; Cullen, 455; Cooke, 499; Bell, p. 28 (edit. 1810); 10 East, 418; Whitemarsh, p. 303.

Respondents' Authorities.—Cullen, p. 229 (edit. 1800); Hunter and Co. Feb. 25, 1825 (3 Shaw and Dun. No. 395); Dickson, &c. Dec. 2; 2 Shaw's App. No. 33; 1 Rose, 434. Feb. 23, 1831.

HINDMAN and GODDARD—MONCRIEFF and WEBSTER,—Solicitors.

HUGH ROBERT DUFF, Appellant.

No. 7.

THOMAS ALEXANDER FRASER, Respondent.

Title to pursue—Fishing.—Circumstances under which (affirming the judgment of the Court of Session) a party was found entitled to challenge a yair erected by another in a loch for catching salmon, although it was alleged that it was erected in virtue of a title derived from the predecessor of the objector.

SIMON, Master of Lovat, was infeft in the Lordship of Lovat, Feb. 23, 1831.
comprehending the Barony of Beauly, through which the river
Beauly (anciently called the Ferne) flows, and “in totis et 2^D DIVISION.
“integris salmonum piscationibus super aquam de Ferne a Ld. Mackenzie.
“Carncross usque ad mare cum lie cruives et omnibus aliis
“proficuis eisdem pertinen.” After passing through part of
Inverness-shire, the river enters Loch Beauly, or Beauly Frith.
This was said by Duff to be an arm of the sea, while Fraser
averred that it formed part of the river. In 1638 the Master
of Lovat granted a feu charter to Thomas Sheviz of the estate
of Muirton, to which Duff had now right. The charter con-
tained the following clause:—“Ac etiam salmonum piscationes
“aliasque piscationes ad dictas terras spectan. ac potestatem
“ædificandi lie zairs aut stells, et occidendi et captandi omnia
“genera piscium tam salmonum quam leuchpheatorum piscium,
“lie blue fishes, cum lie coble vel reta seu aliter intra lie pool
“vocat. lie Roodpool, intra omnes bondas predict. terrarum de
“Muirtoun, versus illam partem Maris vocat. Roodpool et
“utendi omnia genera machinarum ad illud propositum neces-
“saria modo in juribus et infeofamentis in favorem dicti Gu-
“lielmi Duff mentionatis.” The deed also contained a clause
of warrandice in these terms: “Et ab omnibus aliis periculis,
“damnis, actionibus, impedimentis, et inconvenientiis quibus-
“cumque, tam non nominatis quam nominatis, quæ huic
“infeomento ledi seu prejudicare poterint dicto contractui
“confirmiter in omnibus, contra omnes mortales warrantiza-
“bimus ac quietabimus, et in perpetuum defendemus.”

Feb. 23 1891. In 1746 Lord Lovat, the lineal descendant of the granter of the charter, was attainted of high treason, and his estates forfeited to the Crown. They were restored in 1774 to his son, General Fraser, who, after executing a strict entail, died without heirs of his body. Thomas Alexander Fraser eventually succeeded to the estates in virtue of this entail. He made up no title to the Master of Lovat; but in 1823 he obtained a service as heir male to a descendant of the Master, with the view, in the event of the restoration of the honours which had been enjoyed by the family, of having them conferred upon him.

Duff having begun to erect stake-nets within the Beaully Frith, about a mile westward from the entry to the Caledonian Canal, Fraser presented a bill of suspension and interdict to the Court of Session, which was passed. Duff thereupon abandoned the stake-nets, but proceeded to build a yair on the southern shore of Loch Beaully. Fraser then presented another bill of suspension and interdict, which was also passed, and the suspensions were conjoined. Duff maintained,—1. That Fraser had no title to pursue, because his grant of salmon-fishing was confined to the River Beaully, and did not embrace the loch, which in his titles was described as the sea; 2. That, supposing he had a title, he was barred from objecting to the yair in respect that he represented the Master of Lovat, who not only granted right to a yair, but bound himself in absolute warrandice; and, 3. That as Loch Beaully formed part of the sea, and the yair was situated there, it was not objectionable. To this it was answered: 1. That Fraser did not represent the Master of Lovat, nor derive right to the estate from him; 2. That even if he did, the Master of Lovat could not authorize the erection of yairs, which were prohibited by statute; and, 3. That the loch did not form part of the sea, but fell under the description of “waters” mentioned in the statute prohibiting the use of yairs.

The Lord Ordinary pronounced this interlocutor:—“ Finds
“ that the suspender (Fraser) has a sufficient title to complain
“ of the yair erected or proposed to be erected by the
“ respondent (Duff) in case it shall appear that the said
“ yair is, or is proposed to be placed, not in the sea, but
“ in the River Beaully; and appoints the cause to be en-
“ rolled, that an order may be made for trying the question,
“ whether the place of the said yair or proposed yair be in
“ the sea or not.” His Lordship at the same time issued

the subjoined note of his opinion. * Both parties reclaimed; Feb. 23, 1831.

Duff to the effect of being assoilzied, and Fraser to have it found that he had a title to pursue, although it should appear that the yair was not in the river, but was in Loch Beaully. The Court, on the 13th of November 1829, pronounced this interlocutor:—"Find that the suspender (Fraser) has a sufficient title to complain of the yair erected or proposed to be erected by the respondent (Duff) on the suspender's instructing that it is so situated as to fall within the prohibition of the statutes made as to the fishing of salmon; and with this variation they adhere to the interlocutor reclaimed against, and remit to the Lord Ordinary to proceed farther in the cause as to him shall seem just; all claims for expenses of process being reserved entire." †

Duff appealed.

Appellant.—1. In the Court below the judgment was pronounced against the appellant, not on the ground taken by the Lord Ordinary, that the agreement was pactum illicitum, but on the construction of the clause, which, it was alleged, did not confer on the appellant a right to catch salmon by means of the yair. This, however, was an erroneous construction, for it is not disputed that a right of salmon-fishing was bestowed on the appellant, and at the same time, and in the same clause, the power of building yairs, and taking "omnia genera piscium tam

* "The Lord Ordinary is unable to see any ground of doubt that a yair in a river is even more clearly illegal than a stake net—stake-nets being not expressly prohibited, but held illegal, because equivalent to yairs, which were expressly prohibited; nor can he see sufficient evidence of a dispensary power in the Crown of Scotland from public statutes, such as could render yairs in rivers legal by Crown-charter; nor can he admit prescription or special custom against general statutes which are still in vigour. If, then, this yair was in the River Beaully, he considers that it was illegal; and if it was illegal, any warrandice in a grant of it was pactum illicitum and utterly null. The Lord Ordinary does not think that it could be pleaded even in bar of the right of the granter to enforce the statute, still less in bar of the right of the present complainer, who cannot represent him in a pactum illicitum. It would be particularly difficult to derive such a representation through the Crown by a gift of forfeited estates. The Lord Ordinary was averse at first to pronounce the above judgment, in consequence of the case of Dumbarton; but as he does not find that the Court held that case to be undoubted law, he does not think himself at liberty to rest upon it, in the face (as it seems to him) of the statutes."

† 8 Shaw and Dunlop, 14.

Feb. 23, 1831. “salmonum quam leuchpheatorum piscium.” The plea of pactum illicitum is inapplicable, and has been suggested by confounding the right of challenge for public benefit with the private right of challenge for patrimonial interest.

2. The respondent admits that he has served heir to a person who connects him directly with the granter of the charter; and although it is said that the service was obtained merely with a view to the honours, yet it is unqualified, and necessarily imports a representation. He is therefore as much bound by the terms of the grant as if the question were with the Master of Lovat himself, and it is certain that he could not have objected to the erection of the yair which he had expressly authorized.

3. In the titles the Beaully Loch is expressly described as the sea; and at all events the question, whether the statutes be applicable to such a local situation as that of the appellant's yair, being a point of law, ought to have been decided by the Court, and not sent to a jury.

Respondent.—1. All kinds of fish may be taken by yairs, with the exception of salmon, as to which there are repeated statutory prohibitions, directed not only against all the lieges, but even against the Sovereign himself. It is therefore not to be presumed that any such grant was intended or conveyed; and the clause on which the appellant rests truly imports merely a right of erecting yairs for taking other fish, and not a right to catch salmon with them. But, separatim, the grant of a right of salmon-fishing by yairs, being contrary to statute, is illegal; and any warrandice to the effect of enforcing it is pactum illicitum, and consequently not binding.

2. By the attainder of Lord Lovat the line of blood was cut off, and the estates became vested in the Crown. These were restored; and it is from the Crown, as the original author, without the interposition of the granter of the charter, that the respondent derives right to the estates, and therefore he does not in this respect represent him. Again, as to the service, it was taken merely to prove the respondent's collateral connexion with the family, and in order to have the honours conferred upon him in case they should be restored.

3. The question, whether Loch Beaully formed part of the sea, or not, is one of fact, and proper to be submitted to a jury, acting under the direction of a judge, who will tell them whether in point of law the yair falls within the prohibition of the statutes.

LORD CHANCELLOR.—My Lords, As I am to propose to your Lordships to affirm the interlocutor appealed from, I shall not detain you by any observation. I have no doubt that the Court of Session have come to a sound conclusion. As the Court, though unanimous, gave leave to appeal, I shall not propose costs. Feb. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Forbes, Dec. 3, 1701 (7,812); 2 Stair, 3, 70; Chisholm, June 17, 1801; (No. 1. Appendix, Salmon-fishing;) Kintore, May 31, 1826; (4 Shaw and Dunlop, 641, and July 11, 1828; *ante* 3, 261;) Magistrates of Dumbar-ton, Jan. 16, 1813. (F. C.)

Respondent's Authorities.—Statutes, 1488, c. 16; 1563, c. 68; 2 Ersk. 3, 31.

PALMER—A. M'RAE,—Solicitors.

WILLIAM BRACK, Appellant.—*Robertson—Sandford.*

No. 8.

GEORGE JOHNSTON, ADAM HOGG, and Others, Respondents.—*Lord Advocate (Jeffrey)—D. M'Neil.*

Writ—Foreign—Trust.—Held (affirming the judgment of the Court of Session), that a trust-disposition of heritage duly tested, containing a direction to the trustee to convey to any person to be nominated by the truster, together with a testament executed according to the forms of Jamaica, where the truster resided, but not of Scotland, bequeathing his heritage to a particular person, constituted an effectual right in favour of that person, exclusive of the heir-at-law.

DANIEL VIRTUE, a native of Scotland, and proprietor of an heritable estate there, resided in Jamaica, where he possessed considerable property. On the 30th of April 1822 he executed a trust disposition in Jamaica, which was duly tested according to the rules of the law of Scotland. After narrating that he had confidence in the trustee therein named for executing the trust reposed in him, he “did by these presents dispo-
 “convey, and make over, to and in favour of George Johnston,
 “farmer in Yetholm Mains in the county of Roxburgh, North
 “Britain, and his heirs and assignees, as trustee for the uses and
 “purposes after mentioned, all and whole, &c., with all right,
 “title, and interest, I, my predecessors and authors, heirs and
 “successors, had, have, or may have to the said subjects; but
 “declaring always that these presents are granted by me, and
 “accepted of by the said George Johnston, in trust for the ends

Feb. 25, 1831.
 ———
 2^d DIVISION.
 Lord Medwyn.

Feb. 25, 1831. “ and purposes following ; viz.—In the first place, he shall ac-
 “ count to me for the rents and profits thereof during my life;
 “ and in the second place, at my death, he shall assign and dis-
 “ pone the whole premises to such person or persons as I shall
 “ specify and name in my will, or by any separate writing or
 “ letter to that effect; and it shall be sufficient to my said
 “ trustee to dispone the same accordingly, although such writing
 “ or letter hath not the legal solemnities of a deed; in the
 “ which lands and others above disponded I bind and oblige me,
 “ my heirs and successors, duly and validly to infest and seise
 “ my said trust-disponee and foresaids; to be held,” &c. This
 was followed by a procuratory of resignation and a precept of
 sasine, in the usual terms; but there was no clause dispensing
 with delivery. The granter retained the deed in his own pos-
 session, and on his death it was found in his repositories.
 He had two nephews, William Brack and Adam Hogg. On
 the 14th of April 1823 he executed in Jamaica a latter will and
 testament, setting forth that he did “ make this my latter will
 “ and testament, hereby revoking all other wills by me formerly
 “ made.” It was executed according to the forms of the law of
 Jamaica, and not according to those of the law of Scotland.
 After providing certain legacies, and bequeathing an annuity of
 £30 to the appellant, he disposed of the residue in these terms:—
 “ Item, I give and bequeath to my nephew, Adam Hogg, the re-
 “ sidue and remainder of my property, real, personal, and mixed,
 “ consisting of lands, houses, &c. in Berwickshire, Great Britain,
 “ and of Roxburgh Castle, with the slaves, stock, &c. in this
 “ island, he paying therefrom, should my monies be insuffi-
 “ cient, the legacies of my reputed sons John Virtue and
 “ William Brack, and make good all the other legacies, and
 “ pay my just debts, if any.” No reference was made to the
 trust-deed. He nominated the trustee and certain other persons
 to be his executors. After surviving about ten months, he died
 on the 16th of December 1823.

These deeds were transmitted to the trustee, who took
 infestment in the property situated in Scotland, and executed a
 disposition in favour of Hogg, who made up titles, and was
 infest. William Brack, who was the heir-at-law, expedite a
 general service in that character to the deceased, and then
 brought an action of reduction and declarator, concluding
 to have the trust-deed, the testament, and the subsequent

title set aside on these grounds:—" 1. The aforesaid alleged Feb. 25, 1831.
 " gratuitous disposition, executed by the said Daniel Virtue
 " in favour of the said George Johnstone, was neither a
 " completed deed, nor was it delivered by the said Daniel
 " Virtue, but remained in his custody, and was at his abso-
 " lute disposal and under his controul, till the day of his death,
 " which happened upon the 16th day of December 1823, and
 " is otherwise null and void. 2. The said gratuitous and unde-
 " livered trust-disposition granted by the said Daniel Virtue
 " was, besides, completely revoked and set aside by the foresaid
 " testamentary deed, executed by the said Daniel Virtue upon
 " the 14th of February 1823 years, by which he expressly revoked
 " all the other wills which he had previously made. 3. The
 " foresaid testamentary deed, executed by the said Daniel Virtue
 " upon the said 14th day of February 1823, is, in so far as it
 " gives and bequeaths to the said Adam Hogg the testator's herit-
 " able property in Great Britain and in Jamaica, null and void;
 " and it is destitute of all the solemnities and requisites which
 " by law are necessary for the conveyance of heritable property;
 " and, in particular, it is neither holograph of the granter, nor
 " does it express either the place of signing or the name and
 " designation of the writer, or the names and designations of
 " the witnesses present on the occasion when it was alleged to
 " have been subscribed."

In defence it was maintained that the trust-disposition was a good and effectual divestiture by the granter, in favour of the trustee, of the heritable property; and that as he had directed the premises to be conveyed to such person or persons as he should specify in his will, the testament, which was a formal and probative deed according to the law of the place where it was made, was sufficient as a direction to the trustee to convey to Hogg.

The Lord Ordinary pronounced this interlocutor:—" Finds,
 " that on the death of the late Daniel Virtue of Vere in Jamaica,
 " which took place on 16th December 1823, there were found in
 " his repositories two deeds; the first, a trust-deed dated 30th
 " April 1822, executed in Jamaica, but, according to the law of
 " Scotland, disposing, with procuratory and precept, certain
 " heritable subjects in Scotland, in favour of the defender
 " George Johnstone, for uses and purposes, and these are de-
 " clared to be, first, ' to account to him for the rents during his

Feb. 25, 1831. “ life, and, secondly, at his death, to dispoⁿe them to such person
 “ as I shall specify and name in my will, or by any separate
 “ writing or letter, although it shall not have the solemnities
 “ of a deed;’ the second, a will executed on 14th February
 “ 1823, according to the forms of the law of Jamaica, but not
 “ tested according to the law of Scotland, which has this clause :
 “ —‘ Item, I give and bequeath unto my nephew, Adam Hogg,
 “ Jamaica, the residue and remainder of my property, real,
 “ personal, and mixed, consisting of lands, houses, &c. in
 “ Berwickshire in Great Britain :’ Finds, that the trust-deed
 “ contains no clause dispensing with delivery, which indeed
 “ would have been inconsistent with the first and prominent
 “ object of the deed; and that the will makes no reference to it
 “ as a subsisting deed, or one which was then operative, or which
 “ it was to render operative, by declaring its uses and purposes :
 “ Finds it admitted, ‘ that the trust-deed was not delivered to
 “ the trustee in the lifetime of the truster, but that it remained
 “ in his custody and under his controul till the day of his
 “ death :’ Finds, that the trust-deed can have no effect, not
 “ having been a delivered deed, nor the delivery dispensed with
 “ by the maker of it; and therefore that it is unnecessary to
 “ consider whether, if it had been an effectual conveyance of the
 “ heritable property into the person of the trustee, the will, being
 “ a deed not tested according to the law of Scotland, would have
 “ been held to be a sufficient deed of instructions to the trustee
 “ to make over the heritable property in Scotland to the defender
 “ Hogg : Finds, that the will is quite inoperative of itself to con-
 “ vey the said heritable property to the defender, as it does not
 “ contain disposing words; and therefore sustains the reasons of
 “ reduction, at the instance of the pursuer, the heir-at-law; and
 “ reduces, decerns, and declares in terms of the reductive con-
 “ clusions of the libel : Finds no expenses due.” His lordship
 at the same time issued the subjoined note.* To this judgment
 he afterwards adhered, and accompanied his interlocutor with
 the note below.†

* “ The ground upon which the heir-at-law has been preferred being dif-
 ferent from those pleaded in the elaborate memorial for him, the Lord Ordinary is
 willing, if the parties incline, to review the interlocutor, in a representation,
 which, by section second of the Act of Sederunt passed this day, he is empowered
 to authorize.”

† “ The Lord Ordinary still entertains the opinion that the trust-deed required

The respondents having reclaimed, the Court, on advising cases, Feb. 25, 1831. pronounced this interlocutor on the 23d of November 1827 :—
 “ Alter the interlocutor of the Lord Ordinary, submitted to
 “ review: Find the trust-deed in this case effectual, although
 “ it contained no clause dispensing with the delivery, and was
 “ not delivered during the life of the granter: Find the will
 “ afterwards executed by him likewise effectual as a declaration
 “ of his intention and instruction to his trustee, relative to the
 “ disposal of his heritable property in Scotland after his death:
 “ Therefore sustain the defences, assoilzie the defender from the
 “ conclusions of the action, and decern.” *

Brack appealed.

Appellant.—1. The established rule is, that heritage cannot be conveyed, either directly or indirectly, unless the peculiar forms of the law of Scotland be observed. The testament is not executed according to these forms, and it is not pretended that per se it can affect the right of the appellant as heir-at-law. It is true that the trust-disposition is executed agreeably to the Scottish forms; and if it had been a complete deed, and had

“ delivery to make it effectual, as it was obviously intended to be delivered imme-
 “ diately, since it authorizes the trustee to uplift the rents in the truster's life-
 “ time, and calls upon him to account for them to him. Its never having been deli-
 “ vered implies a change of purpose, or that the purpose was not fully resolved on;
 “ and there is nothing to indicate that the second purpose of the deed was finally
 “ resolved to be carried into effect when the other was not. In his latter will the
 “ testator has not once alluded to it; and as it was not transmitted to this country at
 “ first along with the will, it would appear that the testator and his executor had not
 “ regarded the trust-deed as influencing his succession. If the trust-deed were to be
 “ held effectual without delivery, and if it were necessary to form an opinion on the
 “ pleas still argued so anxiously by the pursuer, the Lord Ordinary does not think he
 “ could concur in opinion with the pursuer, that the trust-deed was revoked by the will,
 “ or that the will would not have been a sufficient declaration of the purposes of the
 “ trust, on the ground that it did not bear express reference to it, assimilating this to
 “ the exercise of a reserved faculty to burden; but he would have been inclined to hold
 “ that the will, not being tested according to the law of Scotland, was not sufficient
 “ to have the effect of conveying Scotch heritage from its legal destination. This is
 “ a point of great difficulty, and may be considered, perhaps, as not thoroughly
 “ settled; but the Lord Ordinary remembers well the very decided opinion of Lord
 “ President Blair, delivered in the unreported † case of Lang and Whitelaw, 16th No-
 “ vember 1809. The Lord Ordinary avoided the decision of this difficult question
 “ by holding the trust-deed ineffectual from want of delivery.”

* 6 Shaw and Dunlop, No. 31.

† Vide post.

Feb. 25, 1891. been delivered, or had dispensed with delivery, it might have had the effect to exclude the appellant. But it was not a delivered deed, and at all events it specified no disponent; and therefore, even if it were to be held as a subsisting deed, it would constitute a trust for behoof of the appellant. Indeed, effect cannot be given to the testament without violating the law of death-bed; for, as a testament is held to be made at the last moment of the testator's life, it would necessarily follow that heritage might be effectually transmitted when a party is in articulo mortis.

2. But assuming the trust-deed to be of a mortis causa nature, it was revoked by the subsequent testament; for, although the testament may be ineffectual to transmit heritage, it is quite sufficient as a deed of revocation. This was found in the cases of Crawford, Batley, and Mudie, relative to death-bed deeds, which, although null as transmissions of property, were held good as revocations of previous deeds.

3. Supposing that the trust-disposition were unobjectionable, still the reserved power contained in it was not duly exercised. To accomplish this effectually, it was necessary, both that special reference should be made to the trust-deed, and that the deed by which the faculty was exercised should be executed agreeably to the forms of the law of Scotland. It is said that the reverse was found in the case of Willoch; but it does not appear from the report, nor from the papers, that the deed by which the faculty was exercised was not executed agreeably to these forms. Indeed, an opinion to the reverse was delivered by Lord President Blair in the case of Lang and Whitelaw.*

* A report of this case will be found, 2 Shaw, App. Cases, p. 13. The following notes of Lord President Blair's opinion, taken by the late Solicitor General Wedderburn, were laid before the House of Lords: "The case depends on the validity and effect given to a foreign will. The questions have arisen, Whether such will is effectual, as a revocation of a deed previously executed? and, Whether the clause of revocation amounts to a revocation of the Scotch settlement?"

"The preliminary question is, Whether the deed of revocation is valid, as affecting Scotch heritage? and the first inquiry is, Whether the point is shut by former decisions? But I can see no series rerum judicatarum sufficient to settle it.

"In the case of Barclay the point was not argued, because the deed was supposed to have been holograph.

"In the case of Sir Thomas Dundas the point was argued and decided in this Court, but it was not taken up when that decision was reversed. It was then laid down that the lex domicilii applied to moveables only.

Feb. 25, 1831.

Respondents.—1. As the trust-disposition contained a reservation of the granter's liferent, or of his right to the rents during his life, (which was equivalent to such a reservation,) and was clearly mortis causa, it did not require delivery, nor any clause dispensing with delivery. Accordingly, the appellant himself

“ Considering the point to be open, or at least this the only judgment upon it, I
“ will hold it still liable to decision.

“ There are two views, Whether the deed of revocation was executed in Scotland
“ or abroad?

“ In this case none of the solemnities have been observed, which are enacted not to
“ fetter, but to secure the act of the proprietor.

“ The first Act of Parliament relates to deeds importing heritable title. It is said
“ that this does not constitute a title to the lands. Neither, indeed, does any settle-
“ ment; but it affects the titles to it, and the succession to it.

“ Let it be supposed that two deeds are executed; that the first is not destroyed,
“ and that the last is revoked. The first revives; and this truly affects heritage. There
“ are two classes required to be tested? 1st, Those affecting heritage, which I consider
“ a revocation to do; and, 2dly, Deeds of importance, which a revocation certainly
“ is. Nor is this any restraint—It preserves and secures the will of the proprietor.
“ Is there less temptation and more difficulty to forge revocations? There is more of
“ the first and less of the second undoubtedly. True, a deed may be revoked without
“ writing—it may be destroyed, by which the deed ceases to exist, unless it be revived
“ by proving the tenor, and a casus amissionis different from the act of the proprietor
“ and granter.

“ In the books of law, is there one word to make a distinction between deeds of
“ revocation and other deeds? No exception but in favour of privileged deeds, holo-
“ graph, or in re mercatoria. A person must revoke with the same solemnities of test-
“ ing as in granting. Therefore hold that a deed of revocation is in the same situa-
“ tion with all other important deeds.

“ Is there any difference by the deed being executed in Jamaica? The only distinc-
“ tion here is, that foreign deeds can only affect or convey moveables. But in what-
“ ever touches the land or immoveable property, the law of Scotland must exclusively
“ govern. Nothing can be more clearly determined than this. Even an heritable
“ bond must be so conveyed. The hardship in requiring solemnities in revocations
“ is less than in requiring them in settlements; for the granter may revoke by de-
“ stroying. Even if the clause of reservation in the settlement was, that he should
“ be allowed to revoke without the solemnities of the law of Scotland, it would be
“ null, for the law can listen to no intention, but what is conveyed in an authentic
“ form.

“ Supposing, however, the Jamaica will is to be recognised, I am clear that the
“ expressions in the will are sufficient to reach the Scotch settlement.

“ It is contended that the deed cannot be a revocation unless it be a settlement.
“ I think in general it may. At least this is the legal presumption. But this pre-
“ sumption is removed by the terms of the will, which shew that the revocation was
“ wholly in favour of the widow, and not against her. I rather think that the revo-
“ cation cannot be held to touch the liferent.

“ The Court repelled the objections to the validity of the revocation, but found
“ that it cannot touch the legacy and liferent to the widow.”

Feb. 25, 1891. abandoned this plea when the case was debated before the Lord Ordinary; but his Lordship gave his judgment upon it as a view which had occurred to himself. The Court, however, were unanimously of opinion that this was erroneous; and although the appellant has revived the plea, there is no authority in support of it. Assuming, therefore, that the deed did not require delivery, it had the effect to divest the granter of the feudal right, so that the requisites of the law of Scotland were satisfied. That right was vested in the trustee, subject to directions, and he was bound to give obedience to authentic directions received from the truster; but it is not disputed that the testament is authentic and probative according to the law of the place where it was executed, and consequently the trustee was bound to carry these directions into execution. The case of Willoch is a conclusive authority upon this point; as is also that of Lang, as decided by the Court; and the same decision has recently been pronounced by the Court of Session in the case of Bellenden Kerr. In regard to the plea of death-bed, it is irrelevant and inapplicable, because it is not libelled as a reason of reduction; and it is admitted that in point of fact the testator survived the execution of the testament for ten months.

2. It is impossible to construe the ordinary clause of revocation of all former wills into a revocation of the trust-disposition. That deed was meant to subsist to the effect of enabling the granter to exercise his will by any document, whether probative or improbative; and his plain meaning was, that all wills which he had made inconsistent with the one in question should be recalled.

3. By the trust-deed the trustee was directed to convey the property thereby disposed “to such person or persons as I shall specify and name in my will, or by any separate writing or letter to that effect.” By the testament he nominated the respondent Hogg as his disponee; and although it was not tested according to the Scottish forms, yet it is not necessary that a deed of nomination be so, provided it be probative according to the law of the place where it was executed. Neither is it necessary that it should make special reference to the trust-deed.

LORD LYNTHURST.—As far as regards the trust-deed, I think it did not require delivery to render it valid: first, because the granter

himself had an interest ; and secondly, because, as far as related to the deed, it was a deed mortis causa. On these grounds I am disposed to recommend your Lordships to affirm the opinion of the Court below. I further think that, as far as relates to the will, it was intended by the party to be an execution of the power contained in the first deed. It is impossible to consider the nature of the transaction itself, as mentioned in the first deed, and the description of the property, and not to come to the conclusion that the party intended to execute that. The question that remains then is, Whether the mode of execution was sufficient? If the mode of execution was sufficient, then there is an end of the question. I can hardly distinguish this case from the case of Willoch. It was considered at that time a question of very little doubt. Under such circumstances, I move your Lordships that this judgment be affirmed, but without costs. Feb. 25, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—3 Ersk. 2, 43; Crawford, Feb. 3, 1801 (No. 3, Appendix, Deathbed); Batley, Feb. 2, 1815 (F. C.); Mudie, March 1, 1824 (2 Shaw's App. Ca. 9); Scott, March 2, 1820 (F. C.); Roxburghe, Dec. 13, 1816 (F. C. App. May 25, 1820); Bell on Testing Deeds, 110; 3 Ersk. 2, 22; Logan, Feb. 27, 1823 (2 Shaw and Dunlop, 253); Colville, Dec. 16, 1664 (15,927); Brand, Dec. 4, 1735 (15,941); Davidson, Dec. 20, 1797; (5,597, No. 1, App. Her. and Mov.)

Respondents' Authorities.—Willoch, Dec. 14, 1769 (5,539); 3 Ersk. 2, 44; Lang, Nov. 16, 1809; Bellenden Kerr, Feb. 24, 1829; (7 Shaw and Dun. 454.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—
Solicitors.

ARCHIBALD THOMAS FREDERICK FRASER, Appellant.

No. 9.

THOMAS ALEXANDER FRASER, Respondent.

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail is not liable to implement an obligation granted by a preceding heir in a lease, to pay for the value of meliorations at its expiration.

LORD LOVAT was attainted of treason, 1746, and his estates annexed to the Crown. They were restored in 1774 to his eldest son, Lieutenant-General Simon Fraser, who, on the 16th Feb. 25, 1831.
1st Division.
Lord Newton.

Feb. 25, 1831. of May of that year, executed a settlement and deed of entail of the lands in favour of himself and the heirs of his body, whom failing, to a series of families of the name of Fraser. At the same time, and as a burden upon this entail, he executed a disposition in favour of trustees for payment of debts. He subsequently executed, in 1776, under reserved powers, another trust-disposition in place of the former, which he also declared a burden on the deed of entail. Full power was thereby conferred on the trustees, upon his death, to enter to the possession and management of his estates, to grant tacks of the endurance allowed by the entail, to borrow money for executing the purposes of the trust, and to grant bonds binding upon the heirs succeeding to his estate; and he declared, that the trust should continue until his whole obligations were discharged. The entail contained all the usual prohibitions, and was effectually fenced by irritant and resolute clauses.

On the 17th of March 1779 he addressed this letter to the trustees:—"As you seem to think written authority necessary, "I hereby empower you, in my name, to promise to the tenants "over all my estates meliorations for houses and buildings that "may be made and erected by them, not exceeding three years' "rent of the respective farms, to be paid at their removal by the "incoming tenant; and I oblige me, and my heirs and successors, to implement such promise."

He died in 1782; and the trustees thereupon entered into possession, and assumed the management of the estate. In October 1785 they let the lands of Dalcraig to Alexander Fraser for nineteen years; and, after reciting the above letter, the lease contained the following clause: "It is therefore "hereby specially conditioned and agreed, that the said "Alexander Fraser and his foresaids shall, at the termination of this tack, and upon their removal from the said "lands, be entitled to receive, from the heritor or incoming "tenant, the value of such houses and buildings, including "stone-dykes, as shall then be upon the foresaid lands, to the "extent of £49 16s. sterling money, being three years' rent or "tack-duty of the said lands, provided the value of the said meliorations shall amount to so much, over and above the sum of "£2 19s. 9d. sterling, being the heritors' ground comprising, "by the appreciation of one or two judicious persons, to be "named by each party, for ascertaining the same, at the term of

“ the tacksman’s removal ; but declaring, that whatever may be Feb. 25, 1931.
 “ the value or amount of the said buildings, or other improve-
 “ ments on the said lands, that the tacksman shall only be en-
 “ titled to receive for the same to the amount of the said three
 “ years’ rent or tack-duty, or so much less as shall be ascertained,
 “ in manner foresaid, to be the worth and value of his houses
 “ and buildings ; upon payment whereof he shall be bound and
 “ obliged to surrender the whole to the heritor or succeeding
 “ tenant, without being permitted to carry any part of them off
 “ the ground.”

Under the authority of an Act of Parliament, the trustees sold part of the estate, cleared off the debts, and in 1802 renounced the trust, and surrendered the possession to Archibald Fraser, the entailor’s brother, and next heir of entail. Archibald Fraser then entered into an arrangement with the tenant, by which the latter surrendered his lease, and Fraser thereupon granted a new one to him for nineteen years from and after Whitsunday 1802. This lease contained the following clause:—“ And
 “ whereas, by the foresaid renunciation, the said lease granted
 “ by the said trustees is considered as having expired at the term
 “ of Whitsunday last, whereby the said Alexander Fraser, as
 “ outgoing tenant, is entitled to meliorations, in terms of the
 “ said lease: Therefore, it is hereby agreed upon between the
 “ parties, that at or as soon after the execution of this lease as
 “ possible, the whole houses, biggings, dykes, and inclosures
 “ upon the foresaid possession shall be comprised by one judi-
 “ cious man named by each of the parties contractors, agreeably
 “ to the terms of the said original lease ; and that one or more
 “ schedules thereof shall be made up, to be signed by the appre-
 “ ciators, and by the said Honourable Archibald Fraser of Lovat,
 “ and the said Alexander Fraser, and reference made therein to
 “ these presents, whereof they shall be considered as part ; and
 “ the said Alexander Fraser agrees to defer all demands on the
 “ said Honourable Archibald Fraser and his foresaids, on ac-
 “ count of the said meliorations, until the expiry of this present
 “ lease ; and further binds and obliges himself and his foresaids
 “ to keep, maintain, and uphold the said houses, biggings, dykes,
 “ and inclosures, contained in the said states or schedules, in
 “ equally good repair and condition, as shall be therein ex-
 “ pressed, during the whole currency of this present lease, and
 “ to leave the whole in the like good condition at the expiry

Feb 25, 1891.

“ thereof; it being hereby declared, that the said Alexander
“ Fraser and his foresaids shall then, and not otherwise, be
“ entitled to receive from the said Honourable Archibald Fraser
“ of Lovat and his foresaids, or the succeeding tenant, the sum
“ mentioned in the said schedules or estimates, as the value of
“ the said meliorations, provided the same shall not exceed the
“ sum allowed for the said meliorations by the said lease, granted
“ by the said trustees on the estate of Lovat: Provided always,
“ that the said houses, biggings, dykes, and inclosures shall be
“ found, in the manner above expressed, to be worth that sum;
“ and also, provided they shall be found, at the expiry of this
“ present lease, to be in equally good condition and repair, and
“ worth as much as they shall be found and stated to be in the
“ said schedules and estimates made at the commencement
“ thereof; it being, however, understood, that the said Alexander
“ Fraser is not to be charged for the natural decay of timber,
“ or mason, or stone-work, from mere lapse of time, provided
“ the said Alexander Fraser has, by due attention to keeping
“ the said houses and buildings wind and water tight, and re-
“ pairing and upholding the said dykes and inclosures, and other
“ usual and necessary modes of repair, done all in his power to
“ prevent any deterioration of the aforesaid subjects; providing,
“ in case the said Alexander Fraser shall fail to repair the said
“ houses, buildings, dykes, and inclosures, after three months’
“ notice to that effect by the proprietor or his factor, the factor,
“ or such person as the proprietor shall appoint, shall cause the
“ same to be done by other persons whom he shall employ for that
“ purpose; and the said Alexander Fraser, so failing, shall be
“ obliged to repay the expense thereof to the said Honourable
“ Archibald Fraser of Lovat and his foresaids, as the same shall
“ be ascertained by the Baron Bailie, and diligence for payment
“ of such expense shall pass in the same manner as for the rent:
“ And whereas it may be expedient to meliorate the subjects hereby
“ let, by other biggings and inclosures, to the extent of three
“ years of the present rent, including the amount of the melio-
“ rations allowed by the last lease, and comprised in the schedules
“ above mentioned, it is hereby agreed, that the said Alexander
“ Fraser and his foresaids shall be allowed to lay out upon and
“ meliorate the said subjects, to the extent of three years of the
“ rent presently reserved, provided he shall give previous notice
“ to the said Honourable Archibald Fraser or his foresaids of

Feb. 25, 1831.

“ the biggings or meliorations intended to be made, and shall
 “ obtain his approbation of the same in writing ; and provided
 “ also, that the sum due by the said Honourable Archibald
 “ Fraser of Lovat and his foresaids for meliorations under the
 “ former lease, granted by the said trustees, shall be taken to be
 “ part and portion of the three years’ rent reserved under the
 “ present lease, to which the whole claim for meliorations, as
 “ above specified, shall be confined ; declaring, that whatever
 “ may be the value or amount of the said buildings and other
 “ improvements on the premises, that the tacksman shall only
 “ be entitled to receive for the same to the amount of the said
 “ three years’ rent, or tack-duty presently reserved, or so much
 “ less as the same shall be ascertained, in manner foresaid, to
 “ be the worth and value of the houses, buildings, dykes, and
 “ inclosures ; upon payment whereof he shall be bound and
 “ obliged to render the whole to the said Honourable Archibald
 “ Fraser, or his foresaids or succeeding tenants, without being
 “ permitted to carry any part of them off the ground ; and, in
 “ order to encourage the planting and preserving of trees on the
 “ said farm, the said Alexander Fraser shall be allowed to claim,
 “ as part of the foresaid melioration, the value of all trees planted
 “ and preserved by him, as the same shall be ascertained by
 “ two persons mutually chosen, in manner above mentioned,
 “ provided always, that every fourth tree, so planted as aforesaid,
 “ shall be a lime tree.”

Archibald Fraser died in 1815 ; and, while Thomas Alexander Fraser succeeded as heir of entail to the estates of Lovat, Archibald Thomas Frederick Fraser, as the legal representative of Archibald Fraser, acquired right to his unentailed property.

On the termination of the lease in 1821 the tenant claimed the value of the meliorations from Thomas Alexander Fraser, and brought an action against him, in which Lord Alloway pronounced this interlocutor :—“ In respect that the late Archibald
 “ Fraser of Lovat was in possession of the entailed estate of
 “ Lovat at the expiry of the leases granted by General Fraser the
 “ entailer: Finds, that the meliorations exigible under those leases
 “ were due by him as representative of the entailer, and likewise
 “ as being the heir of entail in possession : Finds, that these meliorations were payable by the heir of entail in possession ;
 “ and that Archibald Fraser, as heir of entail, had it not in his
 “ power to postpone and transfer this obligation, which was”

Feb. 25, 1881. “ exigible from himself, upon any future heir of entail: Finds,
 “ that although these clauses as to meliorations, to the extent of
 “ three years’ rents, were effectual against the heir in possession,
 “ seeing they were obligations imposed by the entailer in the
 “ leases granted by him, yet this did not authorize the heir pos-
 “ sessing the estate to introduce similar clauses, so as to affect
 “ heirs of entail, who did not represent the granter of the leases;
 “ and that such heir had no way of burdening the next heir of
 “ entail with meliorations in buildings, to the extent of three
 “ years’ rent, except by following out the terms of the Statute
 “ of the tenth year of king George the third with regard to the
 “ improvements upon entailed estates: Therefore assoilzies the
 “ defender, reserving, however, to the pursuer his recourse
 “ against Mr. Fraser of Abertarff, and the other representatives
 “ of Archibald Fraser of Lovat, who granted the leases con-
 “ taining the obligations in question, and decerns.” His
 Lordship also issued the subjoined note of his opinion.*

* “ 1. The amount of the original meliorations contracted under the first leases,
 “ having been warranted by General Fraser the entailer, or by his trustees, was an
 “ unquestionable debt due by his heirs to his representatives.

“ 2. Upon expiry of these leases, the pursuer had an unquestionable claim upon
 “ the heir of entail then in possession, who could not take the estate without being
 “ liable for the whole of the entailer’s debts and obligations, and, of course, payment
 “ of these meliorations.

“ 3. The question then is, Whether the heir in possession could not only postpone
 “ and transfer this debt, then become due and exigible by the tenant, at the end of
 “ his lease, upon an heir who had not then succeeded, but could then also create new
 “ obligations to affect that heir to the amount of three years’ rent of the farms upon
 “ which these meliorations should take place, without having power under the entail
 “ to burden either the estate or the next heir with a debt to that amount, or without
 “ his having availed himself of the means which the statute 10 Geo. III. had afforded
 “ him of rendering three-fourths of these improvements a burden upon the entailed
 “ estate?

“ 4. The Lord Ordinary conceives, upon the principle of the cases *Dillon v.*
Campbell of Blythswood, and *Webster against Farquhar*, and other cases of the
 “ same nature, that the heir of entail in possession had no power to subject the suc-
 “ ceeding heir to the payment of these buildings.

“ 5. With regard to the original meliorations under the first lease, although all
 “ the representatives of the entailer are liable for the meliorations, yet the heir of en-
 “ tail who was in possession when that obligation became due and exigible, and his
 “ representatives, are liable, in the first instance, and could not transfer and postpone
 “ this obligation upon the defender, the succeeding heir of entail. It is not disputed
 “ that the heir of entail then in possession, and his representatives, left sufficient
 “ funds for the payment of all those meliorations; and the Lord Ordinary therefore
 “ doubts how far that heir, by a connivance with the tenant having the right to those

To this judgment the Court adhered on the 7th of June Feb. 25, 1831.
1825.*

The tenant thereupon brought an action against Archibald Frederick Fraser as the representative of Archibald Fraser, in which the Court, on the 29th of May 1827, altering an interlocutor of Lord Eldin, “ found the defender liable to the pursuer “ in meliorations, so far as due under the lease betwixt the “ pursuer and the deceased Archibald Fraser of Lovat, and “ remitted to the Lord Ordinary to proceed accordingly. †

Archibald Thomas Frederick Fraser then raised the present action against Thomas Alexander Fraser, concluding to have it found and declared that he was the party liable, and that he should be ordained to relieve the pursuer. The Lord Ordinary, in respect of the above decision, assoilzied the defender; and to this judgment the Court adhered on the 29th of January 1830.‡

Archibald Thomas Frederick Fraser appealed.

Appellant.—In virtue of the powers conferred upon the trustees, and especially under the letter of the 17th March 1779, they were entitled to stipulate that the tenants, upon the expiry of their leases, should have allowance for meliorations, and be made effectual against the heir of entail or incoming tenant. They accordingly did so, and thus created a proper debt against the entailed estate. This was kept up by being transferred to the new leases, and consequently the claim is exigible from the respondent as the heir, taking the benefit of these leases. The late Archibald Fraser had also power to constitute such an obligation against the estate, for it was a proper act of management, and was agreeable to the invariable practice on the estate, which had been recognized by the entailer. If the value of the melio-

“ meliorations, could postpone the payment thereof until the expiry of the next “ nineteen years’ lease.

“ 6. As to the homologation, it is not alleged that any of those buildings for “ which the meliorations are claimed were erected since the defender’s succession to “ the entailed estates; and therefore there is not such a homologation, arising from “ his drawing the rents for some of the last years of the lease, as could transmit this “ obligation upon him.”

* 4 Shaw and Dunlop, No. 61.

† 5 Ibid. No. 336.

‡ 8 Ibid. No. 184.

Feb. 25, 1891. rations was not obtained from the incoming tenant, it was the fault of the respondent; and as he derives the whole advantages from these meliorations, he is justly liable for the value of them, and not the appellant, who obtains no benefit from them.

Respondent.—The general rule is settled by the cases of Dillon, Webster, Campbell, and Tod, that an heir of entail is not liable for the value of meliorations stipulated in a lease by a preceding heir of entail, who is prohibited from contracting debt. None of the meliorations in question were authorized by the entailer. The letter of 17th March 1779 had reference to the leases about to be granted by the trustees, and conferred no power on heirs of entail to impose such an obligation on their successors. By the transaction in 1802 Archibald Fraser took the burden on himself of paying for the meliorations; and this cannot be transferred to an heir of entail, but must fall on the proper representative of Archibald Fraser.

LORD LYNDHURST.—My Lords, I am of opinion that in this case the original engagement was to pay for the ameliorations at the expiration of the nineteen years originally contracted for. If in 1802, while the original leases were still pending, the heir substitute in possession, instead of paying, put the payment forward by executing fresh leases, in order to have the chance of its falling on his successor,—that is a transaction which cannot be allowed to operate to the prejudice of the person to succeed to him in the estate. This is the short point. I think the Court of Session have done perfectly right; and I now move your Lordships that the judgments complained of be affirmed, with costs.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Respondent's Authorities.—10 Geo. III. c. 51; 3 Stair, 5, 18; 3 Ersk. 8, 51 3 Bank. 5, 66; Dillon, Jan. 14, 1780 (15,492); Webster, March 3, 1792 (Bell, p. 207); Campbell, Feb. 15, 1812; (F. C.) Tod, Jan. 14, 1823, (2 Shaw and Dunlop, 113; and May 27, 1825, ante Vol. I. 217); Sandford on Entail, 217.

PALMER and A. M'RAE, Solicitors.

Captain EWEN MACPHERSON, Appellant.—*Robertson.*

No. 10.

Mrs. CATHARINE CAMERON, or MACPHERSON, and Others,
Trustees of the late Colonel MACPHERSON, Respondents.

Marriage Contract—Entail.—Question remitted, as to the validity of an entail executed by a father, who was bound by a marriage contract to secure his estates in favour of the heirs of the marriage, with power to make an entail, and had, as was alleged, exceeded that power.

COLONEL DUNCAN MACPHERSON of Cluny entered into an ante-nuptial contract on the 12th of June 1798 with Mrs. Catharine Cameron, by which, after making a provision of £200 per annum in favour of her, in case of her survivance, he bound himself to secure the whole heritable property of which he was then possessed, or might be possessed at his death, “to and in
“favours of himself and the heirs-male of the marriage between
“him and the said Catharine Cameron; whom failing, to the
“heirs-male of the said Colonel Duncan Macpherson in any
“subsequent marriage; whom all failing, to the other heirs and
“substitutes named or to be named by the said Colonel Duncan
“Macpherson, in any deed of entail already executed, or that
“may be executed, by him, with and under the usual prohibitory, irritant, and resolute clauses competent by the law
“of Scotland, and such other clauses as the said Colonel
“Duncan Macpherson has inserted or shall hereafter insert
“in the said deed of entail, not inconsistent with these presents,
“heritably and irredeemably; and for that effect the said
“Colonel Duncan Macpherson obliges him and his foresaids
“to make and grant dispositions and other proper conveyances,
“containing procuratories of resignation, and all other clauses
“needful for obtaining such charters and infeftments; under
“the reserved power and faculty always to the said Colonel
“Duncan Macpherson, at any time during his life, by a deed
“of entail or other deed under his hand, to put the heirs
“hereby entitled to succeed to the said lands and estate under
“such limitations and restrictions, with respect to alienating
“the same, or contracting debts thereupon, as he shall think
“just and reasonable, and to vary, alter, and enlarge the substitution in any manner he may think proper, provided the
“same in no way hurts or prejudices the heirs-male to be
“procreated of the present marriage.”

Feb. 28, 1831.

1st Division.
Lord Newton.

Feb. 28, 1831.

Of this marriage Captain Ewen Macpherson was the eldest son. His father increased the widow's annuity to £500; and in 1801 executed in favour of a series of substitutes (of whom Captain Macpherson was the first) a deed of strict entail. This was followed, on the 30th of August 1804, by the execution of a trust-disposition, by which the Colonel conveyed to his widow and certain trustees the whole estates of which he should die possessed, for payment of debts, of the annuity to his widow, and provisions to younger children. He then directed them, "after
" payment of the said jointures, annuities, interest of debts, and
" expense of management, to apply an annual sinking fund, to the
" amount of £500 sterling money, if so much remain, towards
" payment and extinction of the principal or capital sums due
" by me; and after deduction thereof, and of the said jointures,
" annuities, interests of debts, and expense of management, to
" make payment of the free residue to the heir of entail, who
" would be entitled to assume the possession of my said estate if
" this trust-deed did not exist; nor shall it be competent to
" the said heir to inquire into or interfere with the manage-
" ment, nor to quarrel or impugn the accounts, of my said
" trustees, nor to object to any article for which they shall take
" credit, upon pretence of enlarging the said annual free residue;
" but he shall be obliged to accept of their accounts, or of any
" abstract showing the free residue, as the same shall be attested
" by the acting trustee or trustees for the time, or their quorum,
" without any inquiry or ground of objection whatever other
" than what may arise from the adjustment and ascertainment
" of their accounts, by an accountant of character, in manner
" hereafter directed: And it is hereby declared, that the said
" annual payment shall not be the foundation of any adjudi-
" cation, or other real diligence against the fee or property of
" my said estate, or a foundation for affecting the rents thereof,
" which shall be uplifted by my said trustees only; and they
" shall be no farther answerable to such heirs than to apply
" the said free balance or residue, after such deduction, as
" aforesaid, in manner above directed." He further " expressly
" provided and declared, that the present trust shall subsist until
" the whole debts chargeable upon the said estate, or owing by
" me, are paid and cleared off, so that my said estate becomes
" perfectly free and disencumbered, and that the heir entitled to
" succeed to it attains the age of twenty-five years complete; and

“ upon the termination of the said trust, the said trustees Feb. 28, 1831.
 “ shall be obliged to yield the possession of my said estate to the
 “ heir of entail,—who, if there was no trust-disposition, would
 “ be entitled to assume the possession of my said estate,—and
 “ to denude thereof in favour of the same series of heirs, and
 “ under the same conditions, provisions, and declarations,
 “ clauses irritant and resolute, that are contained in the said
 “ deed of entail; and always with and under the different
 “ provisions in favour of my said spouse, by the foresaid con-
 “ tract of marriage and bond of provision, and codicil thereto
 “ annexed, and the additional provision in favour of my said
 “ spouse and daughters by this deed. And my said heirs shall
 “ be obliged henceforth to possess my said estate under the
 “ deed of entail above mentioned, and the relative deed to be
 “ executed by the said trustees, which shall be recorded in the
 “ register of tailzies, and by no other right or title whatsoever.”

The Colonel died in August 1817, leaving a family of eight children. At this time Captain Macpherson was a minor. The trustees took possession in virtue of the trust-deed, and continued in the management of the estates uninterrupted till the month of October 1826, when Captain Macpherson brought an action of reduction of the trust-disposition, on the ground that it was “ ultra vires of the granter, inasmuch as the deceased Colonel Duncan Macpherson, by the said contract of marriage entered into betwixt him and the said Mrs. Catharine Cameron or Macpherson, did, in contemplation of the said marriage, inter alia, expressly contract, provide, and secure the foresaid lands and estate of Cluny, Kinlochlaggan, and others therein and above specified, and the whole other heritable property and estates belonging to him at his death, to and in favour of the pursuer, and the other persons, in manner therein and under written.” He therefore concluded that it ought to be reduced in toto; “ or at least the same ought to be reduced, saving and excepting in so far as the said trust-deed of 30th August 1804 may be held by our said Lords to be a security for payment of the bonâ fide and onerous debts owing by the deceased Colonel Duncan Macpherson, the granter, at the time of his death, and for payment of the subsisting family provisions, or for payment of other debts and obligations contracted by the said trustees, for the purpose of discharging the debts outstanding,

Feb. 28, 1831. “ or exigible from the said Colonel Duncan Macpherson himself,
 “ at the time of his death; and also saving and excepting the
 “ heritable bonds, and the bonds and dispositions in security,
 “ or personal bonds, granted by the said trustees to third
 “ parties in security of the repayment of the money borrowed
 “ by the trustees and applied for the purposes foresaid; and
 “ also saving and excepting the instruments of sasine fol-
 “ lowing on the said heritable bonds, and bonds and dispositions
 “ in security, and all deed of transmission or assignation of the
 “ said heritable debts and securities.” He further concluded,
 “ that it should be declared that the pursuer is entitled to
 “ succeed to the foresaid lands and estate of Cluny and others,
 “ contained in the foresaid marriage-contract and trust-deed,
 “ free of all limitations, conditions, and restrictions, in so far
 “ as imposed by the trust-deed, excepting always as aforesaid;
 “ and that he is entitled to the just and true rents, produce, and
 “ profits thereof from and after the term of Martinmas 1817,
 “ being the first term after the death of the said Colonel Mac-
 “ pherson;” or, in case the trust-deed shall not be reduced in toto,
 that the trustees “ should be decerned and ordained, by decree
 “ foresaid, forthwith to dispoise, convey, and make over the said
 “ lands and estate of Cluny and others, contained in said mar-
 “ riage-contract and trust-deed, to the pursuer; and under
 “ burden of the debts bonâ fide contracted by the trustees to
 “ third parties, and still outstanding; or in such form as our said
 “ Lords shall direct.”

The trustees denied that the execution of the trust-deed was ultra vires of Colonel Macpherson; and the Lord Ordinary having reported the question to the Court on cases, their Lordships, on the 22d of June 1827, pronounced this interlocutor:—
 “ Find, in respect of the marriage-contract of the late Colonel
 “ Duncan Macpherson, dated 12th June 1798, that the trust-
 “ deed in question thereafter executed by him was ultra vires
 “ of the granter, and cannot be sustained to any effect whatever,
 “ except as a security for payment of bonâ fide and onerous
 “ debts owing by the said Colonel Duncan Macpherson at the
 “ time of his death, and for payment of reasonable and suitable
 “ provisions to his widow and younger children, and also for
 “ payment of the real and personal debts contracted by the said
 “ trustees, and applied in discharging the bonâ fide and onerous

Feb. 28, 1831.

“ debts which were outstanding or exigible from the said Colonel
“ Duncan Macpherson at the time of his death : Find, that the
“ trustees had full power, by the said trust-deed, to borrow
“ money for the said purposes, and to grant heritable bonds,
“ and bonds and dispositions in security, and personal bonds
“ therefor : Find, that the heritable bonds, and the bonds and
“ dispositions in security, and personal bonds granted by the said
“ trustees to third parties in security of the repayment of the
“ money borrowed by the trustees, are valid and effectual, with
“ all that has followed or that may follow thereon : Find, that the
“ current leases granted by the trustees to third parties of the
“ lands contained in said trust-deed are not challenged by the
“ pursuer, and that the trustees are to be relieved thereof : Find,
“ that neither of the subsisting provisions in favour of the widow
“ nor of the younger children are challenged by the pursuer,
“ and that the said provisions are to hold as reasonable and suit-
“ able, and to have effect accordingly : Find, that the pursuer is
“ entitled to succeed to the lands and heritages contained in the
“ said marriage-contract and trust-deed, free of all limitations,
“ conditions, and restrictions, in so far as imposed by the said
“ trust-deed, but always with and under the real burden of the
“ existing debts contracted and secured as aforesaid by the
“ trustees, and of the subsisting family provisions, and that the
“ pursuer is entitled to the just and true rents, produce, and
“ profits of the said lands and heritages contained in the said
“ trust-deed from and after the term of Martinmas 1817
“ years, being the first term after the death of the said
“ Colonel Duncan Macpherson, and in time coming, and
“ to have the said by-gone rents, produce, and profits ac-
“ counted for to him accordingly : Ordains the said trustees
“ forthwith to dispoise, convey, and make over the said
“ haill lands and heritages contained in the said marriage-
“ contract and trust-deed to the pursuer, and to the other heirs
“ and members of tailzie called by the deed of entail executed
“ by the said Colonel Duncan Macpherson, and under the
“ conditions, provisions, and declarations, clauses prohibitory,
“ irritant, and resolute, contained in the said deed of entail,
“ but always with and under the real burden of the said debts
“ contracted by the said trustees to third parties, and secured as
“ aforesaid, in so far as the same may be yet unpaid, and also
“ under the burden of the subsisting family provisions, as well

Feb. 28, 1891. “ as of relief to the trustees of all bonâ fide and onerous debts
 “ and obligations come under and contracted to third parties by
 “ them as trustees,—the said conveyance to be a burden upon
 “ the said deed of entail; reserving always to the pursuer all
 “ competent right of recourse against the separate estate of the
 “ said deceased Colonel Duncan Macpherson, if he left any, in
 “ order to obtain relief for such of the said debts as shall, by the
 “ conveyance to be executed by the trustees as aforesaid, in
 “ favour of the pursuer, be enumerated as incumbrances
 “ affecting the lands and heritages contracted as aforesaid; and
 “ also reserving to the pursuer all competent right to insist in
 “ an action, for the purpose of having it found and declared that
 “ he is entitled to sell such parts of the said lands and heritages
 “ as may be necessary for the discharge of the debts and obli-
 “ gations brought against the contracted estate, and interest due
 “ and arising therefrom; and reserving to all concerned all
 “ defences competent against such action as accords; and decern
 “ and declare accordingly; and allow this decree to go out and
 “ to be extracted as an interim-decree, and grant warrant
 “ therefor accordingly; and farther, remit the remaining
 “ points of the cause to the Lord Ordinary, to proceed and
 “ do farther therein as to his Lordship shall seem just and
 “ proper.” * Agreeably to this remit, the Lord Ordinary or-
 dained a draft of the conveyance to be granted in favour of the
 pursuer and the other heirs of entail to be prepared and lodged.

Captain Macpherson appealed against the above judgment, and the procedure before the Lord Ordinary, in so far,—1. as it found that the subsisting provisions † in favour of the widow and the younger children were not challenged; that they were to receive effect; and that the pursuer was entitled to succeed under the burden of the subsisting family provisions; and, 2dly, in so far as it ordained the lands to be disposed to the pursuer and the other heirs and members of tailzie called by the deed of entail, under the conditions, &c. of the deed of entail, but with the real burden of the debts contracted by the trustees to third parties, and secured as aforesaid, or as might be yet unpaid, and also under burden of the subsisting family provisions.

* 5 Shaw and Dunlop, No. 399.

† The appellant explained, that he did not dispute the marriage contract provisions; but there were additional supplementary provisions, which neither the estate could bear, nor had his father power to grant.

Feb. 28, 1831.

By these findings the appellant contended that the Court had sustained what the appellant's father had no power to direct or accomplish; besides, neither the question as to existing family provisions, nor the efficacy or validity of the entail, was before their Lordships.

After, however, lodging his case, the appellant presented a petition to the House of Lords, setting forth, that the petitioner appealed to their Lordships from the above judgment, in so far as it sustains the additional provisions granted in favour of the widow and younger children, and ordains the respondents to dispoise the lands and estate in favour of the petitioner, in terms of the deed of entail, inasmuch as the Court had no power to pronounce a judgment on the validity of the entail, that deed not having been brought before them in the action of reduction and declarator: that, since the petitioner's appeal was presented to their Lordships, viz. on the 28th of April 1830, the petitioner and the respondents, and such of the younger children of Colonel Macpherson as had then attained majority, have executed a deed of agreement as to the amount of the provisions to the widow and younger children of Colonel Macpherson, and all claims against each other, whereby it becomes unnecessary to obtain the judgment of their Lordships' house on that branch of the cause, and the respondents and the other parties to the deed of agreement have also thereby bound themselves to acquiesce in the application of the petitioner for a remit to the Court of that part of the judgment in relation to the validity of the deed of entail, so incompetently pronounced; and therefore praying that their Lordships would be pleased to order that this cause might be remitted to the Court of Session, to consider and determine the question of the validity or invalidity of the deed of entail, or that the petitioner might have leave to amend his appeal, by striking out such parts thereof as related to the provisions to the widow and younger children of Colonel Macpherson, and to withdraw the cases already laid upon their Lordships' table by the petitioner, and to substitute an amended case.

Whereupon the House of Lords ordered and adjudged, That the petitioner be at liberty to amend his said appeal, by striking out thereof all such parts as relate to the provisions for the widow and younger children of Colonel Duncan Macpherson, and that

Feb. 28, 1831. the cause be remitted back to the Court of Session in Scotland, to decide upon the validity of the said deed of entail.

G. W. POOLE, Solicitor.

No. 11. JAMES GALBRAITH, Appellant.—*T. H. Miller—Sandford.*

RICHARD GALBRAITH, Respondent. — *Sir Charles Wetherell — Lushington.*

Service.—Held (affirming the judgment of the Court of Session), in a question as to the validity of a service, that there was sufficient evidence before the jury to prove that the party served was the substitute called in a deed of entail,—the party challenging having failed to establish the existence of any other person to whom the designation in the entail could apply.

March 1, 1831. JAMES GALBRAITH of Balgair executed in 1705 a deed of entail, by which he conveyed the lands of Balgair to himself and the heirs of his body, whom failing:—1. To John Galbraith, eldest son of George Galbraith, merchant burgess in Edinburgh; 2. James, second son of George Galbraith; 3. “Major Hugh Galbraith, in the kingdom of Ireland, son of the deceased Andrew Galbraith, the entailer’s father’s brother consanguinean;” 4. Captain Robert Galbraith, in the kingdom of Ireland; 5. John Galbraith of Old Graden; 6. Archibald Buchanan of Drumhead, and such of his sons as the entailer should point out; 7. John Galbraith, in Hill of Balgair, and the heirs male of their several bodies respectively; whom all failing, to certain other substitutes.

2D DIVISION.
Ld. Mackenzie.

The entailer left no issue, and in 1794 the first and second branches of the substitution became extinct. Advertisements were thereupon published, calling on the heirs next in succession to come forward; in consequence of which brieves were obtained by Richard Galbraith in 1806, claiming as heir male of Major Hugh Galbraith, the third substitute in the entail; and by William Arthur Galbraith, who claimed as representing Captain Robert Galbraith, the fourth substitute. A competition ensued, in which Richard Galbraith established his descent from a Major Hugh Galbraith of Capahard, in

Ireland, who was a Major in the King's army at the date of the entail. The chief evidence of the above person being the Major Hugh mentioned in the third substitution was, that he was proved to have spoken with a Scottish accent, and to have been considered a Scotchman; and that in a letter from the son of Captain Robert, the fourth substitute (who resided near the Major in Ireland), to the son of the latter, he addressed him as "dear cousin." But there was no other trace of his connexion with the family of Balgair, while the will of Captain Robert (the fourth substitute), executed in 1708, contained a reference to the event of his own eldest son succeeding to the estate of James Galbraith of Balgair, which, it was said, could not have happened if this Major Galbraith of Capahard, who resided in his neighbourhood, had been the third substitute, as he had five sons, all of whom must have succeeded before Captain Robert's family. On the other hand, William Arthur Galbraith failed in proving any connexion with the fourth substitute; and the Jury, by a majority, served Richard, who accordingly entered into possession of the estate of Balgair. March 1, 1831.

In 1820 a James Galbraith, after being served heir male of John Galbraith in Hill of Balgair, the seventh substitute, raised the present action of reduction improbation, concluding to have Richard's service set aside, on the ground that there was no sufficient evidence laid before the inquest that his ancestor was Major Hugh Galbraith, the third substitute in the entail, to warrant the service, and to have it found that he, James, was entitled to possession of the estate. Richard objected to the pursuer's title, but the Lord Ordinary sustained it; and the Court, on the 21st of December 1821, adhered "to the effect of
 " sustaining the pursuer's title to insert in the reductive conclusion
 " of the respondent's libel, reserving consideration as to all other
 " points of the libel."* Thereafter the Lord Ordinary found, on the merits, "That in the absence of all proof existing or
 " offered to the contrary, the circumstances proven on the side
 " of the defender afford sufficient grounds for inferring that
 " Major Hugh Galbraith, of whose body the defender is heir
 " male, was Major Galbraith, of the kingdom of Ireland, who,
 " and the heirs of whose body, are called in the entail of

* 1 Shaw and Dunlop, No. 261.

March 1, 1831. “Balgair,” and therefore repelled the reasons of reduction, and assolzied the defender; and the Court, on the 20th of June 1826, adhered.*

James Galbraith appealed.

Appellant.—The appellant’s title as an heir substitute having been sustained, it is incumbent on the respondent to show by satisfactory evidence that he also is a substitute, and stands prior in the substitution. If the appellant were claiming to be served heir to the same person, or in the same character, as the respondent has been served, it might perhaps be sufficient to decide the case that the evidence for the one preponderated more than the other. But the appellant does not stand in that position. He claims as an heir under the seventh substitution; and it is incumbent on the respondent to prove, by legal and satisfactory evidence, that he is entitled to the character of a prior substitute. But the evidence was of the most objectionable, illegal, and false nature; and the documents produced in the Court below showed that two persons bearing the same description were confounded together, and that the respondent is descended from the wrong man. To affirm the present judgment would be to overturn the law of Scotland.

Respondent.—The service of the respondent was opposed by a party claiming as an heir substitute, and therefore it did not pass in absence. It consequently lies on the appellant to show that the service was unwarranted; but in this he has entirely failed. In questions of this nature presumptive evidence is all that is requisite; and indeed if the strict rules of the law of evidence were enforced, it would in many cases be scarcely possible to carry through a service.

LORD WYNFORD.—My Lords, your Lordships have been pressed with great earnestness to take care how you overturn the law of Scotland. I believe I am as anxious as any man in this House can be, never to trench upon the law of Scotland. If ever I should find that the law is at variance with justice, I should still think it my duty to act according to that law, leaving it to your Lordships in

* 4 Shaw and Dunlop, No. 442.

your legislative character to alter it. But I should hope there is March 1, 1891.
 little danger of overturning the law of Scotland, when I am about
 to advise your Lordships to affirm the judgment which has been
 pronounced by the Courts in Scotland.

A person of the name of Galbraith, in the year 1705, now considerably more than 100 years ago, made a deed of entail in the following terms:—"On me, James Galbraith, and the heirs to be
 "procreate of my own body; which failing, to John Galbraith (who
 "is the first substitute), eldest lawful son to umquhill George Gal-
 "braith, merchant, burgess of Edinburgh, my cousin german, and
 "the heirs male lawfully to be procreate of his body; which failing,
 "to James Galbraith, second lawful son to the said umquhill George
 "Galbraith, and the heirs male lawfully to be procreate of his
 "body; which failing, to major Hugh Galbraith in the kingdom of
 "Ireland," (the entailor does not say, "of the kingdom of Ireland," but "in the kingdom of Ireland,") "son of the deceased Andrew
 "Galbraith, my father's brother consanguinean." The Respondent claims this estate as the heir of Major Hugh Galbraith, and he must prove by credible evidence, not only that he is the eldest male descendant of Hugh Galbraith, but that this Hugh Galbraith was son to Andrew Galbraith, the entailor's father's brother consanguine. I beg leave, however, to state to your Lordships that these facts are not required, nor are any facts in any Court of Judicature required to be proved by direct positive evidence. These facts may be proved by presumptive evidence, and indeed most of the facts upon which Courts of Justice act, not only in civil but in criminal cases, even in those which affect the lives of individuals, are established by presumptive evidence. Presumptive evidence means this:—where one or more facts are proved, the existence of which makes the existence of the facts to be presumed, according to our ordinary experience, highly probable. We presume the existence of what is probable if there be no counter evidence to prove that it could not have occurred. In criminal cases, it being proved by positive evidence that a crime has been committed, Courts are constantly satisfied with highly probable proof that the person accused committed that crime. In the present case we can act with more satisfaction to ourselves on presumptive evidence. An estate belongs to some person. There is no positive evidence who the person is to whom it belongs. In such a case it must be awarded to the person who has the greatest probability of being the true owner. You have positive proof that there was a Major Galbraith in the kingdom of Ireland, namely, by the evidence of the settler, who so says in the deed of entail; but you have no positive evidence that the person under whom these parties claim was descended from

March 1, 1831. the Major Hugh Galbraith in Ireland, which Major Hugh Galbraith was the son of the deceased Galbraith, whom the testator describes as "my father's brother consanguinean." From the imperfect state of the registers of Scotland at that time, it would be difficult now to furnish your Lordships with direct evidence of that; but then comes the question, Have your Lordships any facts proved in this case from whence you can infer that the Major Galbraith who was in Ireland answers the other description of being a son of this Andrew, the brother of the entailed? Although the settler knew that his relation was in Ireland, he does not appear to have known in what part of Ireland he was. If he had, it is most probable that in this instrument of settlement he would have given a more particular description of him, stating him to be Major Galbraith of Cappahard, or any other place. Then, is that want of description supplied by other evidence? Your Lordships have the return of the army, in which there appears to be a Major Galbraith, although not a major in the regiment in which this major was once supposed to be. And you have this fact, which you will find to be most important, when connected with the parole evidence, that he was a major that served in Flanders. It is proved by Colonel Persse, who was a nephew of the wife of Major Galbraith, that this lady spoke of the civilities that she received from King James during the Major's service in Flanders; here the chain of evidence is complete to prove that there was a Major Galbraith in the army, that that Major Galbraith married Miss Persse, and that he had served in Flanders. The next question is, Is that Major Galbraith who so married Miss Persse and who served in Flanders, a Scotchman? for the relation of the settler was a Scotchman. The same Colonel Persse, who appears to be above all suspicion from his rank and situation in society, tells your Lordships that he had heard that the Major was a Scotchman, and then he gave the best possible evidence that he was a Scotchman,—that he spoke with the Scotch accent. Then your Lordships have another witness, who tells you distinctly that he had it from the Major himself that he came from Scotland. Now, stopping here, it stands thus: that the settler, who lived in Scotland, speaks of a major who was in Ireland; and you have proved by these witnesses that this major came from Scotland into Ireland. Your Lordships will also recollect that the figure of this man is spoken of. He was a man six feet high. By another witness he is spoken of as a big Scotchman. The other witnesses on both sides tell your Lordships that this man had no connexions in Ireland, that there was a mystery about his birth, that he was described as being descended from a hogshead of port, probably from his fondness for that wine. But it is said, he may have come

March 1, 1831.

from Scotland, and he may be a major, and yet he may not be the cousin german of this testator. Now, my Lords, to show that he was connected with the Galbraiths of this family, you have another fact which is extremely important. This man is found with a field cloth, having upon it the arms of the Galbraiths, though, perhaps, not exactly painted as they ought to be, but undoubtedly with such a resemblance between the arms of the family and those painted upon this field cloth, which is described to have been in the possession of this person, as strongly show that he claimed to be a member of that family. Now, it seems to me that all these circumstances taken together constitute a very cogent proof, particularly in the absence of all evidence of there being any other person that would answer the description in the settlement, that this was the person designed by that settlement. But it is said, there are other majors to whom the description in the entail would apply. The first person put forward is a Hugh Galbraith Johnston in the county of Longford. It is said that there was then no militia, and therefore this gentleman must be the Major Galbraith mentioned in the Army List. I believe there was no period, from the feudal times down to the present, in which there was no military body in which persons bore the titles of colonels and majors. The persons belonging to these corps were, generally speaking, considerable land proprietors in the counties for which they served. This Galbraith of Longford might have been one of these majors, and then he would not be likely to be a Scotchman, and the cousin of the settler. This gentleman describes himself in his last will as Hugh Galbraith, gentleman. I venture to say that no man who was or had been a major in the army would have been described in his will as gentleman. At all events he would have been described as esquire. I cannot help thinking, therefore, that is the strongest possible evidence to show that this last-mentioned person had never been a major—that though he might by some persons have been called major, he never could be understood by the entailer as being that Major Galbraith whom he considered to be his cousin consanguinean. This appellant has himself thrown a little doubt upon his own title in setting up this person. It is true that if he sets up any other, that will answer his purpose, because he will defeat this respondent, if he satisfies this House that any other major is the true major designated by this deed, although he cannot have a descent from that person. He also sets up another major that came from Glasgow. It is impossible for any man who has attended to the evidence to hesitate for one moment before he pronounces an opinion, that the man who came from Glasgow never did in the course of his life obtain the rank of major in the regular army, or

March 1, 1831. any other service that would entitle him to be called major in society. It appears that he was a very inferior tradesman ; and the last account you have of him is, that he was still prosecuting his trade. It seems to me that both these competitors are out of the question. If they are put out of the way, then how does the case stand ? With the Army List now lying before you, it appears that no other person named Galbraith can be found possessing a character under which he can compete, with reference to this property, with this man in whose favour the jury of the Court below have found. If they cannot — if there is no other person — then I humbly put it to your Lordships whether you are not satisfied that a fair presumption is raised that he is the man meant ? My Lords, there is another circumstance to which I ought to allude, because I certainly was for a time misled by it. Undoubtedly, in a Court of law in this country, if you saw the jury had been acting upon evidence which ought not to have been received, you can do nothing but grant a further inquiry, because we cannot say whether it was not upon that very objectionable evidence that the verdict was founded. But I find that every one of their Lordships said, they entirely dismissed from their consideration all the objectionable evidence. They said they were to consider whether, striking out all the bad evidence, there was not still sufficient evidence to support the finding of the jury upon the inquisition. They were of opinion that there was. I have taken the same trouble that they have taken, and I have waded through this evidence ; and though my mind for some time was in considerable doubt, I am satisfied that, in the absence of any countervailing evidence, there is enough to raise the presumption I have stated, and that therefore, that presumption not being repelled, your Lordships ought to act upon it. My Lords, there is one fact which has had more weight with me than any other, and it is, that this inquisition was held so long ago as the year 1804. The suit was first instituted in 1799. From 1804 down to this time the respondent has been in possession. I am aware that during part of that time the appellant had no curator ; but he had a father alive ; and it is proved to us now that the father, so far from disputing the respondent's right to this property, was a tenant under him. It seems to me, therefore, that that is extremely strong evidence. We have the evidence of the whole world here that that verdict was acquiesced in, for although this subject was advertised in all the newspapers, so that every claimant might come forward ; and we hear that there were a host of claimants came forward — every man, I suppose, whose name was Galbraith — attempting to make out his claim to this property ; yet no one has ventured to enter the lists subsequently to the time of that finding. It seems to me that that is a

circumstance which ought to weigh more upon your Lordships' minds, in considering whether this verdict has been rightly found, than any other which has been alluded to; for your Lordships may be sure, that if it was possible that any body connected with the family could show that the respondent had no claim, long before this time proceedings would have been instituted by some one. Therefore, my Lords, although this case is certainly a very extraordinary one—though undoubtedly the judges in the Court below appear to have had great difficulties, and to have made observations which were very much calculated to send this case for further inquiry in your Lordships' House—I still think, after having sifted it in the best way I have been able to do during the three days in which it has been under your Lordships' consideration, and having devoted a good deal of my time at home to this immense mass of evidence, after the fullest examination I have been able to give of it, I do think your Lordships ought not to disturb this verdict. I have alluded to the difficulties which the Court below seemed to feel when they were called upon to consider this case, and I think that many of the observations which were made by the judges in the Court below were sufficient to put the parties upon appealing; and therefore I should not recommend your Lordships to give costs. There were fair grounds of appeal, in order to have this case sifted and examined in the manner it has been. It has been examined on the one side and the other with the greatest industry. I have derived great pleasure and advantage from the manner in which it has been discussed at the bar. I therefore humbly recommend to your Lordships that the judgment of the Court below should be affirmed, without costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—3 Stair, 3, 44; Spottiswoode, 494; Mercer, Feb. 24, 1665 (14,424); Speeches in Douglas' Cause, 183; Polmood, July 8, 1812 (F.C.)

J. DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 12.

Sir RICHARD BEMPDE JOHNSTON HONYMAN Baronet,
Appellant. — *Lushington—Sandford.*

ELIZABETH CAMPBELL or HONYMAN, and ELIZABETH and
ALEXA HONYMAN, Respondents.—*Lord Advocate (Jeffrey)—*
A. M^cNeil.

Husband and Wife—Marriage—Process.—Held (affirming the judgment of the Court of Session), that under a summons libelling a marriage chiefly on a consent per verba de præsenti, but also alleging that it would be otherwise proved by facts and circumstances, it was competent to find a marriage proved otherwise than by de præsenti words. 2. That letters, without containing any direct promise, and the conduct of a party, established a promise of marriage; and being followed by copula, a marriage was constituted.

March 3, 1831.

2D DIVISION.
Consistorial.

ELIZABETH CAMPBELL, daughter of the deceased William Campbell, merchant in Edinburgh, describing herself as wife of Sir Richard Bempde Johnston Honyman, and Elizabeth and Alexa Honyman, describing themselves as the children procreated of the marriage betwixt these parties, raised an action of declarator of marriage and of legitimacy against Sir Richard, before the commissaries of Edinburgh.* The summons set forth, “ That in the month of May 1808 the complainer entered “ as governess into the family of the deceased Sir William “ Honyman of Armadale and Graemsay, Baronet, and con- “ tinued to live therein for six years and four months: That “ while living at their house of Smyllum Park, near Lanark, the “ said Richard Bempde Johnston Honyman professed the greatest “ love and affection for the complainer; and she, having fallen “ into a bad state of health in the year 1812, was advised to go to “ London by sea, which she did accordingly in the month of June “ that year, with the permission and approbation of the said Sir “ William Honyman and his lady: That the complainer having “ lived with a relation of hers, No. 8, Millman Street, London, for “ several weeks, and the said Richard Bempde Johnston Hony- “ man having, a short time before the complainer left Scotland, “ gone to Cheltenham, he, soon after her arrival in London, went “ there also, and visited her daily, and sometimes twice a day, at “ the house of her relative in Millman Street, during the whole “ period that she remained in London: That she having re- “ turned from London to Smyllum Park, he, the said Richard

* The discussion related, however, exclusively to the constitution of the marriage.

March 3, 1831.

“ Bempde Johnston Honyman, arrived there much about the
“ same time, and continued his attentions and professions of love
“ and esteem for the complainer as before : That some time in
“ the month of November or the beginning of December 1812
“ he was elected Member of Parliament for Orkney ; and being
“ obliged to go to London about the beginning of the year 1813,
“ to attend his duty in Parliament, he, for some time previous
“ to his setting off, expressed the strongest love, affection, and
“ esteem for the complainer—courted her in marriage—begged
“ and entreated of her to allow him to write to her, and that she
“ would answer his letters, which, he said, would be some con-
“ solation for what he would suffer during their separation :
“ That she having agreed to this, he, a few days after his arrival
“ in London, and before he had written to any of the members
“ of his father’s family, wrote to her ; and they having kept up
“ a correspondence, he, in all the letters which he sent her from
“ London, expressed the strongest love, affection, and esteem for
“ her : That having returned from London to Edinburgh in the
“ year 1813, or thereby, he, upon his arrival, and at his first
“ meeting with the complainer, expressed most unbounded
“ affection for her, and said that his determination was that they
“ should not again part : That he continued to reside sometimes
“ at his father’s house in Queen Street, Edinburgh, and some-
“ times at Smyllum Park, from the month of April to the
“ month of June 1813 inclusive, and during this period his
“ courtship and solicitations to the complainer were incessant.
“ He took every opportunity of being with her in her own room,
“ and of walking out with her whenever he had an opportunity :
“ That in consequence of his addresses, professions of love
“ and esteem, continued and repeated for nearly two years,
“ both verbally and by many letters, he gained the complainer’s
“ affection ; but she, considering that a marriage betwixt them
“ might not be altogether agreeable to his parents or others of
“ his relations, for some time endeavoured to dissuade him there-
“ from. He, however, having persevered in his professions of
“ love and proposals of marriage, requested that she would
“ accept of him as her husband, and that their marriage should
“ be kept private for a short time ; and in particular, he, early
“ on the morning of the 20th day of June 1813, came into the
“ complainer’s bed-room, in his father’s house at Smyllum Park,
“ when he earnestly solicited and entreated the complainer that

March 3, 1831. “ she would consent to take him as her husband, declaring that,
“ on the first opportunity which they had of leaving Smyllum,
“ he would legally make her his wife : That the complainer having
“ resisted his entreaties at this time, he asked her why she would
“ not consent to his wishes, adding, that she might depend upon
“ his honour, and that no one could possibly know what had
“ passed betwixt them ;—to which she answered, ‘ I believe
“ I may depend upon your honour ; but were every eye shut,
“ every ear closed, and every tongue silent, much and dearly as
“ I love you, I should know the circumstance myself, and that
“ would be sufficient to make me miserable :’ That the said
“ Richard Bempde Johnston Honyman, defender, continued to
“ beg and entreat of the complainer to consent to his wishes,
“ assuring her that he was then incapable of injuring either his
“ own honour or her’s : That next morning he left Smyllum Park
“ for Edinburgh ; but having returned thereto upon the 24th
“ or 25th day of the said month of June 1813, he, upon the
“ evening of the day he so returned, came into the room where
“ the complainer was at the time, and having repeated his
“ entreaties that she would consent to their being married, she,
“ in answer, said, that she never would hesitate to become his
“ wife, and that to him every affection of her heart had long
“ been dedicated, but called upon him at same time to
“ recollect, that, by marrying her, he might be making a sacri-
“ fice in the eyes of his relations, seeing she could not offer him
“ any fortune ; and that however respectable her connexions
“ were, his parents might not consider them to be sufficiently
“ so to qualify her for their son’s wife ;—to which he answered,
“ that he would consult his own happiness, and not that of his
“ relations : That, upon this, he asked the complainer if he might
“ call her his wife, to which she having assented, he said to her,
“ ‘ Do then, my beloved wife, let me hear you call me husband ;’
“ —to which she replied, ‘ Dearest, dearest, Dick, you are my
“ husband ;’ and the parties having thus mutually accepted of
“ each other as husband and wife, the said Richard Bempde
“ Johnston Honyman addressed the complainer in the following
“ words :—‘ You are now mine for ever, Betsy ; and, as my
“ wife, you must share whatever I have in this world. You
“ know I have just £200 a-year, and the half of it must be
“ yours :’ That they afterwards lived and cohabited privately
“ together as husband and wife of each other ; and he has been

“ heard, by persons in his own family, as well as by others, to March 3, 1831.
“ acknowledge the complainer as his wife: That of this marriage
“ the complainers Elizabeth and Alexa Honyman were pro-
“ created; and the complainer Elizabeth was born, upon the
“ 27th day of May 1814, at Smyllum Park; and Alexa was
“ born, upon the 27th day of May 1816, at York: That
“ the said Richard Bempde Johnston Honyman, defender,
“ when not living in the same house with the complainer,
“ wrote a great many letters to her from time to time, evi-
“ dently proceeding upon the assumption that marriage had
“ been promised or contracted betwixt the complainer Eliza-
“ beth Campbell and him: That none of these letters have
“ dates affixed; but one of them, which was written by the
“ defender, then in London, to the complainer, refers to a
“ communication which the complainer had made to him of
“ her being with child in consequence of their intercourse; and,
“ after many endearing expressions, he says,—‘ Tell me, my
“ Betsy, if you think there is any likelihood of the event which
“ you and I talked about taking place. If so, you must come
“ directly. I must be with you to comfort and soothe you, and
“ to partake of the joy such an event will excite. You can
“ easily manage to leave Smyllum, by assigning the excuse which
“ you mentioned to me. How is your health, my beloved wife?
“ Take care of it; and pray do not, as you are too apt, trifle
“ with that which so ultimately constitutes your own happiness
“ and mine. If you are not very very fat when we meet, I shall
“ be much mortified. If you love me, dearest, get fat. It is the
“ only thing wanting to make you all I can wish. I dread dis-
“ covery of this epistle. Write me the family movements, and
“ inform me when they return. O! how much I long to be with
“ you. It is the only thing I have to look forward to that cheers
“ my forlorn heart. Farewell! every blessing be with you, my
“ ever dearest affectionate. Your ever unalterable, sincerely at-
“ tached, and affectionate:’ That from said letter, with other
“ letters and documents which will be produced, and from facts
“ and circumstances to be proved, it will be made to appear,
“ that the complainer and the said Richard Bempde Johnston
“ Honyman, now Sir Richard Bempde Johnston Honyman, are
“ married persons, husband and wife of each other; and that the
“ complainers, Elizabeth Honyman and Alexa Honyman, are
“ their lawful children.” This was followed by the usual conclu-

March 3, 1831. sions in regard to marriage and legitimacy, with an alternative one for damages in respect of seduction.

Sir Richard admitted that the pursuer had been the governess of his sisters at Smyllum Park (the country residence of his father, the late Lord Armadale, one of the Judges of the Court of Session, whose town residence was in Queen Street, Edinburgh) : That he returned from India in bad health in September 1811, when he was about twenty-four years of age, and she about twenty-six : That he took up his abode at Smyllum Park, and was in daily intercourse with her. That she went to London in spring 1812; and that he visited her at the house of Mr. Chambers, her uncle, in Millman Street : That she returned, on the recovery of her health, in the course of the same year, to Smyllum Park, to which place he had shortly before come : That the intercourse continued : That in December of that year he was elected Member of Parliament for Orkney, and, in consequence, again went to London early in 1813, while she continued to reside at Smyllum Park : That he returned in spring of the same year, and their intimacy was renewed : That in this summer he obtained possession of her person : That she left Smyllum Park in the end of 1814 : That he again had connexion with her in 1815; and that he was the father of the children. But he denied the marriage; and he alleged that the approaches were not made by him towards her, but by her towards him, and that she was particularly forward in her manners. This allegation was, however, afterwards negatived by witnesses adduced by himself.

From a proof allowed by the commissaries it appeared, that after he went to London in 1813, and before any copula, a correspondence by letters took place between them; but part of those which he wrote to her were lost, under circumstances to be hereafter mentioned; while he admitted that, not long previous to the institution of the present action, he destroyed those which she had written to him.

In February 1813 he wrote to her the following letter, addressed to " Miss Campbell," at Smyllum Park.

" 30, Duke Street, St. James's.

" You will probably have conceived, by the time which I have
 " suffered to elapse since the permission which you so kindly
 " granted me, that I did not intend availing myself of it; but so

“ bewildered and agonized have I been since our separation, that March 3, 1831.
 “ I have been unable to give utterance to my feelings, or form
 “ one rational sentiment, even to her who is the tenderest object
 “ of my regards. O my dearest darling Eliza, much as I thought
 “ I loved when we were together, still does it fall far short of
 “ that affection I now feel, and so fondly cherish towards you.
 “ If the sentiments which I so ardently feel, and have so repeat-
 “ edly avowed, be reciprocal, hesitate not to say so. I am unable
 “ to doubt, after the innocent endearments with which you have
 “ favoured me, that it should be otherwise; yet still, as a solace
 “ to my woes, refuse not this solicitation. Write me. Tell me
 “ that I am dear to you, thou lovely girl. Would that we were
 “ once again together, and nothing shall separate us. I look
 “ forward with rapture to our again meeting, and then we must
 “ form plans for putting our feelings out of the reach of hate. I
 “ intend being with you much sooner than I intended. From
 “ the embarrassed state of my father’s affairs, my residing in
 “ London is both improper and disagreeable; and it was
 “ only to please him that I ever went. God knows how bad
 “ a politician I shall make, and I would resign such a situation
 “ with great happiness. I went yesterday and paid a visit to the
 “ outside of No. 8, Millman Street. The blinds were up, and
 “ the windows open. Ah! thought I, they have a different in-
 “ mate in the house now to what they had when I knew it, and
 “ the conclusion sunk deeply on my heart. Believe me, I feel a
 “ fondness for the house, for it was once the abode of Eliza. I
 “ took a most accurate survey of it. The windows were new
 “ painted, and there was the little Chambers, who took such an
 “ insurmountable antipathy to me, looking out at one of them.
 “ Farewell for the present, my dearest Betsy, thou best beloved.
 “ Love me as I love you, and put my heart at rest by assuring
 “ me of it. You will receive this on Monday, and write me
 “ soon. God bless you, thou dearest girl. Again farewell; and
 “ believe me, with an attachment strong as it is pure, yours most
 “ affectionately, R. B. J. HONYMAN.”

On receiving from her an answer to this letter, he in the same month replied:

“ I received your most welcome letter this morning, my ever
 “ dearest Eliza. Well does it deserve an immediate acknow-

March 3, 1831. " ledgment. Never can I sufficiently thank you for the alacrity
 " which you have displayed. I rejoice to think, my sweetest love,
 " that you do know how impatient I am. If that be one of my
 " failings in the common occurrences of this sad world, how much
 " is it increased when expecting a letter from you. I may safely
 " say, that the only real enjoyment I have had since leaving you
 " is the perusing of your letters. Many is the kiss I give them,
 " and many is the sigh that escapes when I think at what a
 " distance the dear writer is at. Soon, however, I trust, we
 " shall meet, and one soft embrace will repay me an age of
 " anxiety and distress. Oh, my darling Eliza, my dearest
 " beloved, my sweetest and my only love, with what anxiety do
 " I look forward to again beholding you—with what rapture do
 " I anticipate the realizing of those visions which my fancy has
 " already formed. Nothing, I trust, will thwart the happiness
 " I look forward to — nothing shall, nothing can ; for it is felicity
 " sanctioned by virtue herself, and every thing that is tender
 " and amiable. In offering you, my best beloved, that heart
 " which has for a long time been devoted to you, I have only
 " to lament that it is not a more deserving gift to her to whom
 " it is offered. We will talk over the future when we meet.
 " Would there was a Millman Street in Edinburgh ; opportu-
 " nities cannot, however, be wanting, and we must make the
 " most of them. I delivered your dear letter this day. Send
 " all your letters to me, and they shall be delivered. Never am
 " I so happy as when engaged in your service. Anxiously do
 " I look forward to Wednesday. Never, thou dearest girl,
 " disappoint me in hearing from you. Tell me the day you
 " mean to write, that I may have something to look forward to.
 " Believe me, I am deserving of all your sympathy and all your
 " love, for I am, without you, a wretched mortal. Farewell,
 " thou in whom all my joys are centered ; my lovely Betsy,
 " adieu. Believe me ever yours, most faithfully attached,

" R. B. J. HONYMAN.

" P. S.—Pray, my love, direct your next cover to your aunt's.
 " I am apprehensive of Queen Street."

In the spring of the same year he also wrote to her the following letter :

" My dearest, dearest Eliza,—If I were not the very worst
 " correspondent in the whole world, I should have wrote at least

“ half a dozen of letters before now, in return for the affectionate March 3, 1831.
 “ ones I have received from you. I ask but a continuance of
 “ such goodness for one fortnight longer, and by that time
 “ I hope to be indebted for favours of a still more tender sort
 “ than even those of your dear letters. How much, my sweetest
 “ love, am I now your debtor, and how happy am I to ac-
 “ knowledge it. My dearest Eliza, my darling friend, you who
 “ are every thing to me, in whom my whole happiness is cen-
 “ tered, and whom, while I exist, I shall never cease to love ;
 “ even death itself shall not subdue the fervour of my attach-
 “ ment. If it be permitted the immortal part of us to retain
 “ the recollection of those who on earth were most dear, I’ll love
 “ thee then, even when my love can no more avail. You deprive
 “ me, thou who art the most dear of thy endearing sex, of a very
 “ great pleasure, by prohibiting my delivering your letters to
 “ our uncle. Be it so ; I obey, as you desire. You cannot,
 “ however, insist on my not visiting the street, without being very
 “ arbitrary. No such prohibition having as yet arrived, I shall
 “ continue, as heretofore, to visit it once in the day at least.
 “ As to your letters, thou dearest of women, I can never burn
 “ them. If you are afraid to trust,—but no—you are too gene-
 “ rous ; you judge people too much by your lovely self to sup-
 “ pose any improper use should ever be made of them. I
 “ cannot destroy ; but may I be bereaved of every thing I value
 “ in existence, or existence itself, if I ever, under even every or
 “ any circumstance, betray a sentiment or syllable of such
 “ affectionate effusions. Indeed, you may trust me, my love ;
 “ but it shall only be until we meet, for I will deliver all your
 “ letters into your possession. Farewell, my only love ; God
 “ bless you, my sweetest Eliza. Yours ever,

“ R. J. HONYMAN.”

He returned to Smyllum Park towards the end of April,
 where he continued till June or July 1813. He admitted that
 during this period he for the first time had connexion with her.
 She alleged that it took place upon the night of the 24th or
 25th of June ; that his courtship had previously been incessant,
 and his solicitations to acknowledge him as her husband, and
 admit him to the privileges, had been urgent ; that (as stated in
 the summons) upon this occasion he asked her if he might call her
 his wife, to which she having assented, he said to her, “ Do then,

March 3, 1831. " my beloved wife, let me hear you call me husband." To which she replied, " Dearest, dearest Dick, you are my husband." Whereupon he said, " You are now mine for ever, Betsy ; and, " as my wife, you must share whatever I have in this world. You " know I have just £200 a-year, and the half of it must be yours." She alleged that these expressions had been overheard by his sister Jemima ; and in consequence that lady was examined as a witness, and emitted the following deposition :—" Depones, That " the family resided at Smyllum Park in summer 1813, and her " brother resided with them there at that time. Interrogated, " Whether, in the month of June 1813, or in the course of the " summer of that year, she recollects of overhearing any con- " versation betwixt the pursuer and defender, who were in a " room adjoining one in which she, the deponent, accidentally " was at the time ? depones and answers, No ; I never overheard " any conversation between them whatever. Specially interro- " gated, Whether, upon any occasion, she heard the pursuer, in " addressing the defender, use words to the following effect, " ' Dearest, dearest Dick, you are my husband ;' and to which " he replied, ' You are now mine for ever, Betsy ; and, as my wife, " you must share whatever I have in the world ?' depones and " answers, No ; I never heard any thing in the kind. Interro- " gated, Whether she ever observed any particular intimacy " betwixt the defender and the pursuer,—any intimacy more " than was natural betwixt her brother and one who was in the " situation of governess in her father's family ? depones and " answers, No, none whatever ; no more than what took place " betwixt her and any of my other brothers and cousins who " were at that time in my father's family. Interrogated, " Whether she is certain of never having, at any time, or upon " any occasion, overheard any such conversation as the one " above mentioned betwixt the pursuer and defender ? depones " and answers, No, upon no occasion ; I am quite sure I " never did. Interrogated, Whether, upon any occasion, she " recollects of using any expression in speaking to the pursuer, " such as calling her her sister ? depones and answers, No, " I never did upon any occasion. Interrogated, Whether, " upon any occasion, she ever said to the pursuer, that she was " sure she was her brother's wife ; and that she, the deponent, " would take great care of her children ? depones and answers, " No, I never did. Interrogated, Whether, upon any occasion,

“ she ever said to the aunt of the pursuer, in presence of her March 3, 1831.
 “ mother and sister, that she, the deponent, was sure the
 “ pursuer was her brother's wife? depones and answers, No,
 “ I never did.”

The pursuer having gone in the winter of 1813 to Edinburgh, the defender wrote to her this letter from Smyllum Park :—

“ My darling Betsy,—I have received your letter very safely,
 “ and request you will give yourself no uneasiness about it.
 “ Careless as I confess myself to be about many things, I never
 “ had, and, moreover, most solemnly swear to you, my dearest
 “ love, that I never will have, cause to upbraid myself with
 “ inattention to any thing relating to your dear self. The
 “ assurances which you have given ought to satisfy me; but I
 “ long to hear them while locked in your arms, and pressed to
 “ that heart of hearts, the only one that mine will ever throb
 “ at approaching. You have every thing, my best beloved, for
 “ securing my affections; and the result will prove the truth of
 “ my assertion. You are every thing in the world to me.
 “ Without, I am bereft of every thing; and possessing you,
 “ I have nothing more to ask. Trust me, love, I know my own
 “ heart; and believe me, my beloved, these are its sentiments.
 “ I am writing in the midst of interruptions, and time presses.
 “ I rejoice you are to be with us on Wednesday next. The
 “ carriage will be in on Monday with William, and you can
 “ come out in it. How I long for you, my dearest love; how
 “ I long for Wednesday, and all its joys and pleasures. What
 “ a scrawl, Betsy; how unconnected the sentences; in short,
 “ what a production. It is a letter that requires a partial eye
 “ like yours to peruse. I have time for no revisions, but I
 “ trust there is need of none. The language of the heart,
 “ in however uncouth a form, should be the most acceptable.
 “ Farewell, thou joy of my life; dearest, dearest, dearest being,
 “ darling Betsy, your ever affectionate and unalterably attached,
 “ R. J. HONYMAN.

“ P.S.—Let me hear of your health by Jemima. Do not
 “ tire; nor write again, as the time of our meeting is nearer
 “ than I had dared to hope.”

Both of them being in Edinburgh, and she being resident at this time in the house of her aunt, Mrs. Fraser, the defender

March 9, 1831.

having (as she alleged) taken some jealousy for a supposed predilection shown by her to one of his brothers, addressed to her this letter :—

“ I know not what to say after our meeting to-day. It has
 “ made me very unhappy ; but still I cannot upbraid myself with
 “ being culpable. I wish to think no more of it, for I cannot
 “ believe your behaviour proceeded from any diminution of
 “ affection, or from a change of those feelings which you have
 “ so frequently expressed for me. You must also forget the past,
 “ and impute my behaviour to surprise and regret at finding
 “ what I conceived to be coldness and...[*torn*]...where I so little
 “ exp

“ Farewell, Betsy, I have diseased
 “ imagination ; but I trust you will never be able to accuse me
 “ of having a bad heart. Believe me, I would not intentionally
 “ hurt any one, far less that being for whose happiness I would
 “ lay down my existence. R. B. J. HONYMAN.”

(Addressed to) Miss E. Campbell, }
 Mrs. Fraser's, 1, Mound Place. }

In the spring of 1814 he went to London, and wrote the following two letters, the one of which was much torn, and the other contained an expression (“ beloved wife”), which, being written upon an erasure, led to an investigation, by means of persons of skill, as to whether it was an *ex post facto* superinduction, or had been written at the time. The evidence was inconclusive, but rather preponderated to the latter alternative. The first of these letters, said to be dated in April 1814, was, so far as preserved, in these terms :—

“ My dearest, dearest Eliza,—I received your kind letter some
 “ days ago, and ten thousand thousand thanks to the dear writer
 “ of it. You have made me truly happy by the affectionate senti-
 “ ments you avow to feel for me, my darling love. I pray hea-
 “ ven I may only merit a continuance of your love and regard.
 “ Never in this world can I be happy without you ; and if I do
 “ but possess such a treasure, it shall be my sole study to pro-
 “ mote your happiness by every means that is within my power.
 “ There are obs()les in the way ; but these
 “ surmounted. Write me
 “ love and tell me what

“ do, I will abide by whatever March 8, 1831.
 “ best, but let the letter
 “ dictated by love and
 “ I had began to think
 “ our intention to write
 “ impatient was I at not hear-
 “ by the return of
 “ you are, as I hope, equally
 “ a thing my long
 “ have tended to ease
 “ these lines, however,
 “ must efface every idea of the kind ; for, believe me, my heart is
 “ entirely yours, and you are the object of its tenderest regards.
 “ I often think of the happy nights I have spent with you in the
 “ school-room, but let me hope there are some still more exqui-
 “ sitely so to come. I hope to be once again in your lovely
 “ arms, my dearest Betsy, before another month elapses. I can-
 “ not but warmly approve of the reason you gave for going out
 “ the day we left Edinburgh. Oh, my love, ever bear in mind
 “ that henceforward you have made them over to me. You
 “ have now no embraces for any one else, not even for aunt
 “ Fraser or sister Anne. I call them so, for your aunt is my
 “ aunt, and your sister my sister—
 “ As our affection
 “ ciprocal, I hope our
 “ are so likewise, if mine
 “ so. I will tutor them to
 “ to Eliza. Farewell thou
 “ girl, believe me, with
 “ which a warm and d
 “ heart is capable of feeling
 “ ever,

R. J. HONYMAN.”

The next letter, said to be dated in May, and which contained the above expression (“beloved wife”), was as follows:—

“ My dearest, dearest Eliza,—If you think I have forgotten
 “ you, my best beloved, by having allowed two days to elapse after
 “ their departure from Smyllum without writing, you will judge
 “ me very wrong. Friday would have been too soon to write, and
 “ Saturday morning I went into the country, from whence I have
 “ but within this hour returned. Now, that I am away from you,
 “ I know how much I love you. I have no happiness except

March 8, 1831. “ looking forward to being once more with you. God knows
 “ when that will be. Not for some weeks, if my father persists
 “ in coming to London. If not, I hope very shortly to embrace
 “ the darling of my heart. Betsy, love, my fate is fixed. I
 “ never can exist without you ; you are the only comfort of my
 “ existence. How much do I appreciate the possession of so
 “ affectionate a heart. I will be contented to live in any part
 “ of the world with you, and under all circumstances ; it is alike
 “ indifferent to me what part of this world, or in what situation,
 “ provided you are with me. How are you to write me, dearest ?
 “ Tell sweet Jemima to write, and you can put a letter inside.
 “ I only ask you to say that you are satisfied with me. I repose
 “ with implicit confidence on the fidelity of your heart. Tell
 “ me, my Betsy, if you think there is any likelihood of the event
 “ which you and I talked about taking place. If so, you must
 “ come directly. I must be with you to comfort and soothe
 “ you, and to partake of the joys such an event will excite.
 “ You can easily manage to leave Smyllum, by assigning the
 “ excuse which you mentioned to me. How is your health, my
 “ beloved wife ? * Take care of it ; and pray do not, as you are
 “ too apt, trifle with that which so ultimately constitutes your
 “ own happiness and mine. If you are not very, very fat,
 “ when we meet, I shall be much mortified. If you love me,
 “ dearest, get fat. It is the only thing wanting to make you all
 “ I can wish. I dread a discovery of this epistle. Write me
 “ the family movements, and inform me when they return.
 “ Oh ! how much I long to be with you ! It is the only thing
 “ that I have to look forward to that cheers my forlorn heart.
 “ Farewell ; every blessing be with you, my ever dearest and
 “ affectionate [*torn*]

“ Your ever unalterable, sincerely attached, and affectionate,
 “ R. B. J. H.”

In June of the same year (1814) the pursuer was delivered at Smyllum Park of her first child. She had adopted such careful precautions as to succeed in concealing her pregnancy from the family, and she delivered herself without the circumstance being known to any one in the house. Within twenty-four hours thereafter she took the child to Edinburgh, and placed it with a nurse, and then returned to Smyllum Park. She stated, that

* The vitiated expression.

the reason for the concealment of the marriage, and of the birth of this child, was the belief which the defender had impressed upon her, that if the marriage were discovered, his father would instantly disinherit him. March 3, 1831.

Towards the end of that year she left Smyllum Park, after having been there for nearly six years and a half. It was proved that she had realized about £400. She went early in 1815 to visit a friend near Inverary; and the defender, being in Edinburgh, addressed her in February of that year the following letters:—

“ My darling Eliza,—You, no doubt, think that I have been
 “ forgetful of you ; I can assure you, however, that it is not so.
 “ I have been vexed and agonized since we parted, and have
 “ only one wish—to see you once again. I hear you intend
 “ remaining at Inverary until May. Should such be your
 “ intention, a long time must elapse before we meet. I will say
 “ no more until I hear from you, and entreat you to write me
 “ a single line, saying if there be any prospect of our soon
 “ meeting. R. B. J. HONYMAN.

“ You had better address your letter to R. Johnston, Fortune’s
 “ Hotel, Prince’s Street.”

“ I can only say, my dearest Eliza, if you think I am not the
 “ same to you that ever I was, you judge me wrong. I have
 “ the same feelings of affection for you that ever I had ; and
 “ although my long silence might have led some, under similar
 “ circumstances, to suppose that I had not acted up to what I
 “ professed, I never believed it possible that you could doubt
 “ the sincerity of my regard, unless explicitly avowed by myself.
 “ When can I see you ? I intend going to Glasgow on Monday.
 “ Write me, addressed to the Black Bull, to be kept until called
 “ for. Tell me, my love, if we can meet, and where. I will come
 “ to Inverary. Indeed, my only motive for going to Glasgow
 “ is to be nearer you, in the hope that you can make some
 “ arrangement for our meeting. I go to London soon, and
 “ anticipated the happiness of seeing all the schemes we had
 “ formed realized. Tuesday at farthest I shall be at Glasgow,
 “ and I could easily come on to Inverary or near it. Write, how-
 “ ever, to Glasgow. I must see you. Write guardedly, affix
 “ no signature, and let the letter be unintelligible to any one
 “ but myself.

“ Farewell, my darling Eliza. Expecting to meet you soon,
 “ I will say no more. Yours unalterably, R. B. J. H.”

March 3, 1831.

He afterwards set out for Inverary, and, on his arrival at Cairndow (in the neighbourhood), addressed to her this letter:—

“Cairndow, Thursday.

“Dear Miss Campbell,—I intended myself the pleasure of
“seeing you at Inverary on a walking excursion which I had
“undertaken; but having met with a misfortune which all pe-
“destrians are liable to, I am compelled to relinquish that
“pleasure. The accident to which I allude is an injury which
“I have sustained in the tendon of one of my legs, which ren-
“ders me incapable of moving. This will be delivered to you
“by a Highlander, whom I have instructed to procure me some
“mode of conveyance back to Dumbarton. I am aware that
“this epistle is unnecessary. It, however, will serve to evince
“my intentions had I reached Inverary. Believe me, yours
“truly,

R. B. J. HONYMAN.”

“To Miss Campbell, Captain }
Campbell’s, Inverary.” }

She soon thereafter came to Edinburgh, where their intercourse was renewed; and having again become pregnant, she, to avoid discovery, left her aunt’s and went to York, where she was delivered, in June 1816, of her second child.

Between this period and 1821 there did not appear to have been any intercourse between them; and she stated that, in the meanwhile, she supported herself and children by the funds which she had realized by her own industry, and by the assistance of her aunt, who died in 1821. In October of that year she wrote to the defender a letter, which, however, he afterwards destroyed; and, in answer to it, he sent the following from Smyllum Park:—

“I have received the letter from Mound ———. I
“should have answered it much sooner, but have been confined
“until to-day to the house. My feelings to the person I alluded
“to are the same as ever. I hope some day soon to be able to
“reimburse them for the expense they have been at. A small
“parcel by the coach on Monday will reach me without, I hope,
“exciting suspicion. I am impatient to hear, and should rejoice
“once more to see

“Ever

I hope to be in Edinburgh in a fortnight. Seal the parcel.”

He accordingly visited her, and their intercourse was renewed and continued till the end of 1823. During that period the two

following notes, one dated in October 1822, and the other in March 3, 1822, June 1823, were written by him to her:—

“ It will not be possible for me to be in Edinburgh to-morrow
“ or Saturday. This I am sorry for; it will be some day of the
“ week after the next.”

“ I write this to say I will be in Edinburgh on Monday night.
“ I will see you at half-past ten on that evening. Yours ever.”

He alleged that about the end of 1823 he went abroad, where he continued till June 1824. During this period he had no communication with her, nor did he contribute any support either to her or her children.

In the meanwhile her funds were exhausted; and having contracted debt, and been unable to pay her rent, she was, in May 1824, thrown into prison, and her effects sold off by public roup. Among these it was proved that there was an escritoire containing various loose papers, which she alleged were letters from the defender, but these could not now be found.

Under the belief that the defender was at Smyllum Park, and his father being still alive, she wrote to him on the 10th the following letter, the words of which are inverted:—

“ Rof dog ekas emoc ot nwot eht tnemom uoy eviecer siht—fi
“ uoy od ton, eht secneugesnoc yam eb tsom elbaeergasid ot
“ flesruoy—yreve gniht sah deripsnart htiw drager ot eht —
“ —, dna a nosrep si ot tiaw nopus uoy eht gninnigeb fo eht keew
“ no rieht tnuocca. Siht yam eb detneverp yb ruoy gnimoc ot
“ nwot. Tisi ytissecen taht sah edam em etirw, tub o od emoc.”*

“ Addressed R. B. J. Honnyman Esq. }
Smyllum Park, Lanark.” }

It appeared, that under the circumstances in which she was placed she had been compelled to disclose to her brother-in-law the position in which she stood with the defender; and in con-

* EXPLANATION.

For God sake come to town the moment you receive this,—if you do not, the consequences may be most disagreeable to yourself;—every thing has transpired with regard to the —, and a person is to wait upon you the beginning of the week on their account. This may be prevented by your coming to town. It is necessity that has made me write, but O do come.

March 3, 1831. sequence her brother-in-law wrote to him a letter, stating that except for her solicitations he would have waited on him, and if no answer were returned, other measures must be immediately resorted to. On the following day she wrote to the defender :—

“ Is it possible that you do not mean either to write or come ?
 “ I am in confinement, and to-morrow your —— will be left
 “ without a home, without one who will bestow the common
 “ necessaries of life on —— . I have had much to do to
 “ prevent my brother being with you this week. I could not,
 “ however, prevent him writing to you, which I am informed
 “ this morning he has done. O do not blame me. Could you
 “ look into my mind, and see what I suffer, I doubt not but you
 “ would alleviate my misery, at least if you possess the same
 “ goodness of heart you once did. O think of your chil—— .
 “ Think what must be —— fate. Think of what I
 “ must have suffered ere I was brought here. Do, for mercy’s
 “ sake, come or write immediately. Address Mrs. Laing, Calton
 “ Hill Jail.

“ Friday evening.”

“ For God’s sake do try some means to assist me. My poor
 “ —— this day without a home. What is to become of
 “ them ? I think reason is on the point of forsaking me. O
 “ would to God that the grave would shelter me, and all that
 “ belongs to me ! I cannot write ; I cannot think. O have mercy
 “ upon me, and try to lessen the miseries that surround me.

“ Saturday morning.”

Again, on the 3d of July, she wrote to him :—

“ Your children are starving, and almost naked, going about
 “ without a shoe on their poor feet. Is it possible you can know
 “ this, and not do something for them ? The smallest supply
 “ would be thankfully received on their account ; and unless it
 “ be quickly, God only knows what is to become of them. They
 “ are at present a burden on the meagre bounty of those who
 “ can ill afford a morsel for their own children, and who cannot
 “ be expected, were they ever so willing, to be able to do it
 “ any longer. Oh ! think but for a moment of their situation,
 “ and surely your heart cannot but pity, and your hand assist
 “ them. There is no matter how small the sum ; little will sup-
 “ ply their present wants. Do send them something by the
 “ coach of Monday, addressed to A. George, No. 5, Murray

“ Street, Crosscauseway. Od rof snevaeh ekas dnes meht gniht- March 3, 1831.
 “ emos, ro yeht tsum eid róf tnaw, ro teem htiw na ylemitnu
 “ evarg. Tahw a lufdaerd thguoht, tahw a lufdaerd dne retfa
 “ lla taht sah neeb dereffus rof meht. [*Explanation of last sen-*
 “ *tence* :—Do, for heaven’s sake, send them something, or they
 “ must die for want, or meet with an untimely grave. What a
 “ dreadful thought ! what a dreadful end ! after all that has been
 “ suffered for them.]

“ Anxiously will Monday’s coach be looked for. How they
 “ are to subsist till then I know not ; but may God temper the
 “ wind to the shorn lamb. Oh ! need more be said to make you
 “ feel ? No ; for after what has been said, if you give them no
 “ assistance, this world with them will soon be at an end.

“ Saturday morning, 6 o’clock.”

He returned her this answer on the 5th :—

“ It is your fault ; why do you not see the gentleman who has
 “ undertaken, on my part, to make arrangements for the chil-
 “ dren. Tell the woman in James’ Square that you will meet
 “ him, and he will fix a time. This must be done immediately.
 “ I send five pounds for them, and shall not send any thing
 “ more until a settlement takes place.

“ Indiscreet woman, to send your letter wafered with a dry
 “ wafer.”

The gentleman here alluded to was the defender’s law agent,
 to whom he had committed the management of the matter. On
 the 14th the pursuer wrote to the defender this letter :—

“ SIR,—However painful it may be for me to address you
 “ on the subject that is to form the contents of this letter, I
 “ feel I ought,—and have been urged—strongly urged—to lay
 “ before you many circumstances, of which I am aware that, if
 “ you choose to apply to memory, you must acknowledge as
 “ facts. There are other circumstances of which you are not
 “ aware, which shall be communicated to you, and which I am
 “ assured—by those who have a much better knowledge of the
 “ importance of what has already been submitted to their inspec-
 “ tion than I ever had—will give myself and children a title to
 “ your name, and force you to give a settlement adequate to the
 “ situation you hold in life.

March 3, 1831.

“ Oh, Dick ! how pained, how agonized do I feel, to be
“ forced to address you in the manner I have done, and am
“ about to do — you, whom I have worshipped, as having the
“ tenderest affections and the best of hearts ! Am I at last to be
“ compelled to know I have, like all other idolators, wor-
“ shipped an empty image, that has deceived me, and left
“ me to the only true God’s punishing hand. Oh, Dick ! let
“ me entreat of you to believe that it was with the greatest reluc-
“ tance, and under circumstances of the most distressing nature,
“ that ever induced me to give into the hands of any one the
“ papers, and a knowledge of what had passed between us.
“ You know how much I have suffered for you, and how silent
“ and unrepining I have been ; and I am sure you think I
“ would have continued to do so, could I have seen a possibility
“ of keeping your dear children from literal starvation. I am
“ now to bring under your eye events of more than eleven years
“ standing. You must know the manner in which you came to
“ me on the morning of the 20th June 1813, at Smyllum Park,
“ between the hours of one and two A.M.—how you solicited,
“ how you entreated, that I would consent to your wishes, and
“ that the very first opportunity you had of leaving Smyllum,
“ and I the same, you would legally make me your wife. When
“ I resisted your entreaties, you said, Why should I ?—could
“ I not depend upon your honour ? and that no one could pos-
“ sibly know what had passed between us. My answer to you
“ was, I believe I may depend upon your honour ; but were
“ every eye shut, every ear closed, and every tongue silent,
“ much and dearly as I love you, I should know the circum-
“ stance myself, and that would be sufficient to make me mise-
“ rable (and you know how miserable I soon was). You know
“ how you begged, how you entreated after this, and assured me
“ that you was now incapable of injuring your own honour or
“ mine. Next morning you left Smyllum for Edinburgh,—
“ you may recollect upon what errand. You returned to
“ Smyllum upon the 24th, came in the evening to the school-
“ room, between the hours of six and seven o’clock, and en-
“ treated that I would consent to our being married. I an-
“ swered, that I never would hesitate to become your wife —
“ you to whom every affection of my heart had been long dedi-
“ cated ; but what a sacrifice was you making in the eyes of
“ your friends and relations, for I could neither offer you

“ fortune nor connexions, however respectable mine were, that March 8, 1831.
“ they deemed necessary for your wife. Your answer to me was,
“ Damn my relations — I am to consult my own happiness, not
“ theirs. You then said, Am I to call you my wife?—You
“ may. Do, then, my beloved wife, let me hear you call me
“ husband.—Dearest, dearest Dick, you are my husband. You
“ know that, when your affections and feelings are interested,
“ in what a strenuous manner you can speak, and that it is not
“ the boundaries of a small room that will keep secret your
“ voice or words when agitated.—(Mark what follows)—There
“ was one of your own family an ear-witness of what then
“ passed, and in consequence of which I have a letter addressed
“ to me some months afterwards, in one part of which she calls
“ me her dear sister, and in another her dear Lady Dicky.
“ So much can I depend upon her honour, that I feel perfectly
“ certain, had I nothing under her own hand to substantiate the
“ fact, that were she put to her oath, she never, for one moment,
“ would hesitate to affirm what she asserted to my late aunt,
“ in presence of your mother and sisters, that she was sure I
“ was your wife, and which was distinctly heard by another
“ witness now in life. There are also two other witnesses who
“ can assert in what terms they have heard you name me, at a
“ period much antecedent to the above-mentioned. How little
“ was I then aware, that what passed between us was to be of
“ such essential service to myself and children eleven years
“ afterwards, and how impossible it would have been for any
“ one to persuade me at that time that my beloved Dick was
“ other than truth and honour itself. Cruel, cruel change, that
“ has made this letter necessary to you ! I have given all your
“ letters into the hands of one who will use them prudently for
“ me—letters wherein my own claim is placed beyond a doubt;
“ and one letter, bearing date November 1st, 1821, in which
“ you acknowledge the great expense I have been at in sup-
“ porting your children for such a number of years, and that
“ you would be in Edinburgh a fortnight after and see me;
“ but that fortnight never came. In September 1822 I went
“ to within a short distance of Smyllum Park. I wandered
“ about the whole afternoon and a part of the night, until my
“ wearied limbs could no longer support me, and I lay down at
“ the foot of one of your father’s hay-stacks. Early in the
“ morning I again resumed my wanderings, and was, as I

March 3, 1831. “ thought, fortunate enough to meet you. I then told you,
“ I could no longer support your children, and that you must
“ do something for them. You then proposed boarding them
“ somewhere; but where that was to be, or who was to pay
“ their board, you would give no information; and, I believe,
“ merely to get quit of my importunities, you promised to see
“ me in Edinburgh in twelve or thirteen days after. This period
“ was lengthened out to twenty-seven days. You then came;
“ but what was the result of that meeting? You went away
“ without giving any thing to your children, and without pro-
“ mising to give any thing towards their future support. Many
“ interviews have taken place since that time; but still nothing
“ was given or promised for their support, unless you meant to
“ constitute two pound-notes you gave them on the 4th De-
“ cember 1822, and two sovereigns on your return from Hartle-
“ pool a few months afterwards, a sufficient reimbursement for years
“ that had passed, and have since passed. If that was your idea,
“ you will find that you have been mistaken. You have thought
“ fit, through the medium of Mr. Hamilton, to assert that I had
“ received from you, for the benefit of your children, much
“ above £100. You know how incorrect this statement is.
“ You know how and in what manner Elizabeth was brought
“ into this world, and that in seventeen hours afterwards I left
“ Smyllum for Edinburgh with her, naked as she was born.
“ You know that I was fortunate enough to find a nurse for her,
“ at which nurse’s, I, at my own expense, kept her for eighteen
“ months, and found her in every article of clothing, and every
“ incidental expense that was incurred. I shall have no hesi-
“ tation in affirming most solemnly, at any time, that from the
“ day of Elizabeth’s birth, on the 27th of May 1814, and that
“ of her sister Alexa, on the 27th of May 1816, I never re-
“ ceived one sixpence for ten years for their support. You
“ cannot have forgot what passed relative to them last January,
“ when I made you fully acquainted with my own situation,
“ and that it was impossible for me to find them in food,
“ clothing, and a home any longer; and that had it not been
“ for the late Mrs. Gilchrist, who lent me, from time to time,
“ considerable sums of money, they must, long ere that time,
“ have been begging from door to door. You seemed to feel,
“ sincerely feel, the misery of our situation; but still nothing
“ was done to mitigate that misery. Since that time I have

“ been at Smyllum—I have written, others have written, but March 3, 1831.
 “ all applications, until a short time back, have been neglected.
 “ I have been forced to be thus circumstantial, as a copy of what
 “ is now submitted to your eye must be given into other hands,
 “ and thankful I am my painful task is so near an end. You
 “ may depend upon it, the preceding contents of this letter
 “ have not been written with a view of interesting your feelings.
 “ I know my own rights, and will never attempt to ask as a
 “ favour what I can command. Was it not refined cruelty to
 “ force me to an interview with a stranger—to make me the
 “ gazing-stock of one who could not be interested in my fate?
 “ and, you may depend upon it, I never shall consent to another
 “ meeting. Mr. Hamilton cannot arrange the business that is
 “ between us; and whatever may be your determination after
 “ a perusal of this letter must be addressed to Mrs. Wilson,
 “ or to myself to her care. She, deeply as she is already in-
 “ volved, will be my friend, and, being both able and willing,
 “ I cannot be too thankful that such a friend is still left me.
 “ I shall have no hesitation in permitting a copy of this letter
 “ to be sent to your father, which will be done in a very short
 “ time; but I wished it first to be addressed to yourself.—In
 “ the meantime, believe me, &c.

“ ELIZABETH HONYMAN.”

The defender transmitted this letter to his agent, accompanied by one in these terms:—

“ My dear Hamilton,—The accompanying letter abounds
 “ with lies from beginning to end—not one word of truth in it.
 “ I send it for your edification and perusal. Jemima says she
 “ can swear no such conversation was ever held, and she never
 “ said or thought that this Miss C. was my wife. I wish you would
 “ write me, and do something. Suppose I wished to be married
 “ to-morrow, what could I do? Here is a bitch of a woman who
 “ says what she cannot prove; but still it places me, with the
 “ anxious feelings I have, in a very uncomfortable situation.
 “ Would you have me come in?

“ R. B. J. HONYMAN.”

During her confinement in prison she had been compelled to disclose to Mrs. Wilson (who was one of her creditors) her claims upon the defender, and a communication was in conse-

March 3, 1831. quence opened between Mrs. Wilson and the defender, in the course of which she made statements (as he alleged), as to what had passed between her and the pursuer, inconsistent with those made judicially by the pursuer. In consequence, Mrs. Wilson was examined as a witness, and emitted this deposition :—

“ Interrogated, If she recollects of the pursuer living in a
“ house in Mound Place? depones and answers, Yes, I do. I
“ was at that time residing in Lancashire, and I came to visit
“ my mother in Edinburgh, and visited the pursuer when living
“ in Mrs. Cunningham’s house in Mound Place. Interrogated,
“ In what year that was? depones and answers, It would be
“ three years previous to 1824, but I cannot recall it more par-
“ ticularly to my recollection, unless I was at home. Interro-
“ gated, If there were any children in family with the pursuer
“ when she visited her in Mrs. Cunningham’s house in Mound
“ Place? depones and answers, Yes, there were two—two girls.
“ Interrogated, If she the deponent made any inquiries at the
“ pursuer about these children? depones and answers, No; I
“ understood they were two children she had the charge of.
“ Interrogated, When the deponent discovered that these two
“ children were the pursuer’s children? depones and answers, It
“ was in 1824, when I came to attend my mother on her death-
“ bed. Interrogated, Where the pursuer was living at that
“ time? depones and answers, My first interview with her was in
“ the jail on the Calton Hill. Interrogated, If the deponent
“ made any inquiries at the pursuer respecting the two children
“ when she saw her in the jail? depones, I did. During my
“ attendance on my mother, I saw she was particularly distressed
“ about a loan of money she had made, which was likely to be
“ hurtful to my interest; and from what I learned, I took an
“ opportunity, without my mother’s knowledge, of going to the
“ jail, and when there, and conversing with the pursuer, I
“ thought myself entitled to ask her whose children the two
“ were, my mother having to my knowledge advanced about
“ £160 to her. The pursuer was particularly distressed, and
“ said that she could not answer that question, and said that she
“ was bound in such a manner not to do it, although she ad-
“ mitted I was well entitled to put the question. Although much
“ distressed at seeing her in the situation she was in, I still
“ insisted that she should give me some answer; but she said, if

“ I would wait a few days, she would write to the person inter-
“ rested, and get permission to do so ; and she promised, if she
“ did not get an answer in the time fixed upon, she would take
“ upon her to communicate it to me. Interrogated, depones, I
“ returned to the pursuer in three or four days. Interrogated,
“ If the pursuer then made any disclosure respecting the chil-
“ dren to the deponent ? depones, Yes, she did ; she said to me
“ she supposed I was come to demand an explanation ; and I said
“ I was. She answered, that she had written several letters
“ previously at different times, but had got no answer, either to
“ the previous letters, or to the one she had written by my
“ desire. I then renewed my former question, whom these
“ children belonged to, and she answered, they were hers. I
“ asked her who their father was, and she mentioned they were
“ Mr. Honyman’s. I then expressed my disapprobation of her
“ having brought herself into the degraded situation of having
“ had repeated children to the same person ; when she, with all
“ the appearance of dignified innocence, said, I was not to take
“ it in that view—they would never have been there in that
“ way ; that she did not consider herself in any degraded situa-
“ tion. From what she said, and her manner (for there was as
“ much conveyed in her manner as her words), I then imme-
“ diately implied that she was married ; and I said to her, as I
“ think my words were, ‘ There has been a marriage ? ’ to which
“ she seemed to nod assent, but made no reply. I then asked
“ her when it had taken place, and she answered the year, but I
“ cannot recollect whether she mentioned the year 1811 or 1812.
“ Interrogated, If any farther conversation passed ? depones, I
“ put it to her, if she was Mr. Honyman’s wife, why she was in
“ that awkward situation of being in so poor a lodging,—for she
“ had left the jail ; and she answered, that Mr. Honyman was
“ entirely dependent upon his father, and that the marriage could
“ not be acknowledged in his father’s lifetime, or words to that
“ purpose. There was some conversation also passed betwixt us
“ regarding the pursuer not having got any answers to her letters,
“ and I asked her if it would have any effect for me to write to
“ Mr. Honyman. She answered, perhaps it might ; and if I
“ chose to do so, she would give me the address, which she did.
“ Interrogated, If the deponent wrote to Mr. Honyman ? de-
“ pones, Yes ; I wrote a short note requesting a personal inter-
“ view with Mr. Honyman. Interrogated, If she got any

March 3, 1831 ;

March 9, 1881. “ answer? depones and answers, No. After several weeks had
“ elapsed, Mr. Honyman called upon me in the evening, between
“ nine and ten o’clock, accompanied by that gentleman (*pointing*
“ *to Mr. Hamilton*), whom I now see in Court. Interrogated,
“ What passed? depones, Mr. Honyman asked me if I had not
“ written him a note; I said I had; and when Mr. Hamilton
“ apologized for Mr. Honyman not having sent an answer, saying,
“ as I think, that Mr. Honyman had been in France, I then said
“ that I had requested a personal interview, having a communi-
“ cation to make to himself, signifying that Mr. Hamilton should
“ withdraw; to which Mr. Honyman replied, I was at perfect
“ liberty to make it before Mr. Hamilton. I then said I had no
“ hesitation to do so; that it was regarding a claim of a particular
“ nature that a lady, a Miss Campbell, had upon him; and he
“ admitted that he was acquainted with the lady. I then said
“ I understood she was married to him; and as she was his wife,
“ I considered I had a claim upon him for the money my mother
“ had advanced to the pursuer; and I mentioned the state of
“ health my mother was then in, and as her representative I
“ made the demand upon him; to which Mr. Honyman answered,
“ she was not his wife; and I continued to press upon Mr. Ho-
“ nyman, from the impression made upon my mind by the
“ pursuer in my communications with her, that there was a
“ marriage; and I urged it upon him, feeling quite certain that
“ it was so; but Mr. Honyman still denied it. I then said to
“ him, Perhaps, then, you will not acknowledge the children; to
“ which he answered, Oh, yes, they were his. And Mr. Hamil-
“ ton asked me where Miss Campbell was, as they wished to see
“ her, relative to settling some matters with her. I answered, I
“ did not know then where she was, but I should endeavour to
“ find out; and it was agreed I should do so; and that she, the
“ pursuer, was to meet Mr. Honyman and Mr. Hamilton in my
“ house on the Tuesday evening, as requested by them. The
“ person I employed to find her out sent her to me on the
“ Monday evening, and I told her what had passed betwixt
“ Mr. Honyman and Mr. Hamilton and me. Interrogated, What
“ passed betwixt the deponent and the pursuer when she gave
“ her this information? depones and answers, It threw her into
“ an agony of grief, and she expressed the greatest surprise.
“ After some time she recovered a little. She said, Then I sup-
“ pose he denies the children also; he may do the one as well as

“ the other. Those were pretty nearly her words. And she then March 3, 1831.
“ said, if I saw the letters that had passed betwixt them, it would
“ corroborate what she had told me; and, from what had passed
“ betwixt Mr. Honyman and me, I certainly desired to see
“ them; and when she brought them, and gave them me to read,
“ she said, at the same time, that there were other letters much
“ stronger than these, from Mr. Honyman to the pursuer, that
“ were either lost or left at the time of the sale of her furniture,
“ as her servant had only brought her papers in a very confused
“ way, or she thought it very likely they may be in the trunk
“ which had been arrested, and left locked in the jail. And she
“ mentioned, that in one of these letters, which she said was from
“ Mr. Honyman’s sister, Miss Jemima, to her, she (the pursuer)
“ was addressed ‘ Lady Dicky,’ and in two or three places her
“ ‘ dear sister.’ Interrogated, If, when the deponent informed
“ the pursuer of the conversation she had had with Mr. Hony-
“ man, in which he denied the marriage, the agony of grief
“ appeared to be put on or affected? depones and answers, No,
“ it could hardly be so. Interrogated, How she is enabled to
“ recollect the exact date of the interview betwixt Mr. Honyman
“ and Mr. Hamilton and the deponent? depones, My mother
“ died on the 28th of June 1824, and these gentlemen called on
“ the Saturday evening preceding her death. Interrogated, If
“ she had said to Mr. Honyman, at the time of this conversation,
“ that the pursuer had told her she had been married by an
“ English clergyman? depones and answers, No. Interrogated,
“ If she said she had been married by any clergyman? depones
“ and answers, No. Interrogated, If she, the deponent, supposed
“ there had been a marriage by an English clergyman? depones
“ and answers, When she first gave me to understand she
“ was married to Mr. Honyman, and mentioned that it had
“ taken place in the year, as I have said, either in 1811 or 1812,
“ I recollected she had been in London about that time, and I
“ knew she had two cousins of her aunt’s, clergymen, one of
“ them settled in London, and I supposed she might have been
“ married by one of them; and I asked her if the ceremony was
“ performed by one of the Mr. Durhams—those were my ex-
“ press words, I think. She smiled and said, I see you are
“ determined to know all. She made me no further reply than
“ that. Interrogated, If the pursuer ever said to the deponent
“ that she could bring the clergyman to confirm her statement?

March 3, 1831. “ depones and answers, No. And she adds, in the conversation
“ I had with Mr. Honyman and Mr. Hamilton, from this im-
“ pression being upon my mind, I said I thought I could know
“ in a few posts. Interrogated, If the deponent ever stated to
“ Mr. Hamilton, the defender’s agent, that she had discovered
“ the pursuer’s statement to be false, and that she had come to
“ the conclusion that no reliance could be placed on her veracity?
“ depones and answers, No. Interrogated, If any thing has
“ occurred since that time to change the deponent’s impression
“ that the pursuer’s statement was true, and that the parties were
“ married persons? depones and answers, No; I still have the
“ same opinion I formed then. Cross-interrogated, If she has
“ read any of the papers or pleadings in this case? depones and
“ answers, I saw one, I think. I think, if I recollect right, it
“ was a printed paper, drawn by Mr. More, and some years
“ ago. Interrogated, If it was in 1827? depones and answers,
“ I think it was about two years ago; and being shown the
“ revised memorial, depones and answers, I think that is the
“ paper. Interrogated, depones, The pursuer brought that
“ paper to me. Interrogated, If she considers she has any inte-
“ rest in the decision of this case, depones and answers, Nothing
“ but what appears on the face of this evidence. Interrogated,
“ If the debt of £160 is paid? depones and answers, No.
“ Interrogated, If, in the conversation she had with Mr. Hamil-
“ ton and Mr. Honyman, she said she could in a few posts hear
“ from the clergyman who married them? depones and answers,
“ To the best of my recollection I did not make use of the word
“ ‘ clergyman.’ From the impression upon my mind, as already
“ mentioned, owing to her aunt’s cousins being clergymen, I
“ urged it very strongly on Mr. Honyman that he was married,
“ but I do not think I said he was married by a clergyman.
“ Interrogated, If, in any subsequent communications which she
“ had with Miss Campbell, or from what she had learned, she
“ came to place less confidence in Miss Campbell’s statements
“ than she had done at first? depones and answers, In the con-
“ versation I had with Mr. Honyman he so confidently denied
“ his marriage that I was staggered; but after I had seen and
“ read the letters, which was after my interview with Mr. Ha-
“ milton, these letters seemed so strong that my impression in
“ favour of the pursuer’s statement returned to what it originally
“ had been.”

The last letter which the pursuer addressed to the defender March 3, 1831.
was on the 25th of December, and in these terms:—

“ Sir,—I did not think any thing could have induced me to
“ write to you again ; but, alas ! the wants of two poor little
“ creatures compel me to it ; far less did I think that the busi-
“ ness now pending would have been so long of being decided.
“ I ask for nothing for myself. I merely ask for a small sum to
“ supply their present great want. They have passed this day
“ without food, and are likely to do the same to-morrow. The
“ only means I have now in my power to avert starvation is to
“ beg from door to door for them ; and the most likely conse-
“ quence is, that I shall be sent to the police, where I must give
“ an account of what has reduced myself and them to such want.
“ I cannot possibly think you would like to have your neglect
“ of them made so public. I would not have made this appli-
“ cation, but I have wearied out the few friends I have, begging
“ for them. I lay myself out of the question ; for I have
“ worked more in the last few months than would have been
“ sufficient to keep me comfortable. How can you be so
“ unfeeling to them, however much you may wish to punish
“ me ? Surely they are innocent. My mind is often in a state
“ of madness. I wander the street without knowing whither
“ I am going. And, O ! what dreadful thoughts often possess
“ it. When I look from my window, and see the broad sea
“ before me, I think how soon might all our miseries be at an
“ end. But, O ! blessed be God, my soul has yet been kept
“ from the dreadful crime of murder. May his power preserve
“ my soul from such a crime. I now humble myself to beg
“ from you for them ; and if you do not send something by
“ Monday’s coach, do not blame me for what may be the con-
“ sequence, for I am nearly distracted. You may address your
“ parcel, as you did the last, to A. George, Murray Street,
“ Crosscauseway. It must be carriage-paid, for I have nothing.”

The defender took no notice of this letter, and wrote to his
agent:—

“ My dear Hamilton,—I intend mentioning the whole affair
“ to my father. No arrangement shall I come to until the
“ claims which Miss Campbell asserts she possesses are sub-
“ stantiated in a court of justice, or given up. I cannot charge

March 3, 1831. " my memory with having at any time given her the slightest
 " ground, in words or writing, for taking the name she has
 " done. I write this in haste, in order you may be able to
 " communicate my intentions to Mr. C. before he leaves Scot-
 " land. Ever yours, &c. " R. B. J. HONYMAN."

He accordingly informed his father; and on the death of the latter, which happened soon afterwards, the pursuer and her two children brought their action.

The Commissaries, on advising the proof, on the 11th of July 1828, decerned in the conclusions for declarator of marriage, adherence, and legitimacy, and found expenses due. The defender having complained by bill of advocation to the Court of Session, their Lordships, on the 7th of July 1829, recalled the interlocutor, and remitted to the Commissaries to allow farther proof, and thereafter do as should be just. A great part of the evidence already alluded to was in consequence adduced; and, on resuming consideration, the Commissaries, on the 26th of February 1830, again decerned in the above declaratory conclusions, and found expenses due. *

* The following opinions were at this time delivered by the Commissaries:

Mr. Com. George Ross.—We formerly gave our very deliberate opinions upon this case. The Court above, upon considering our judgment, recalled it in the meantime, to the effect of admitting additional proof, and remitted the case to us for the purpose of reviewing it. That proof has been taken, in obedience to the appointment of the Supreme Court, and the only point we have now to consider is, how far the additional proof so taken can in any way alter or affect the judgment formerly pronounced.

In order to make up my mind upon this point, I have again gone carefully over the whole proof; and upon the proof as it originally stood, I continue decidedly of the opinion which I formerly expressed. The case hinges upon the correspondence which passed between the parties—mainly upon three letters of the first series; and in judging of the import and effect of that correspondence, there is one important question which ought never to be lost sight of, viz. Were the intentions of the parties in writing these letters of an honourable or a dishonourable nature? The defender is now anxious to represent his own conduct in the most dishonourable light, and in doing so he indulges in a strain of levity and gaiety ill becoming the serious nature of his offence, and the decorum which ought to be observed in a court of justice. If the defender, throughout the correspondence before us, were guilty of the intentions he now attributes to himself, I know no terms strong enough to express my reprobation of his conduct. But I do not believe the defender in this matter; and the correspondence itself proves to my satisfaction that he was sincere and honourable in his intentions at the time when he wrote the letters, and in that light the pursuer was entitled to understand his conduct, and to rely upon it.

The defender then presented another bill of advocacy, but March 3, 1831.

Another observation of great importance in this case is, that the counterpart of the defender's letters do not appear. And why not? It is only because the letters have been destroyed by the act of the defender himself. He says, indeed, that he destroyed them, because he considered them of no value; and yet he had kept them for a period of ten years, and then destroyed them at the very time when the pursuer was advancing the claim which was followed up by the present action. In such circumstances we should do injustice to the pursuer, if we did not hold the presumption that her letters, had they not been so destroyed, would have strengthened and confirmed the evidence afforded by the defender's letters now before us.

And now, with regard to the additional evidence, there is not a great deal of it, and of what there is, little is of a direct kind, but it certainly goes to confirm some of the statements formerly made by the pursuer. She had stated that there at one time were other letters in her possession, which had been lost under circumstances of a very painful nature, to which she referred; and it is now distinctly proved that she was hurried away to jail, and that, with her other articles of furniture, her *escritoire*, containing papers, was roused and sold in her absence. And when it is considered that the pursuer was reduced to this extremity of wretchedness, and subjected to this risk of loss, solely in consequence of the defender refusing to answer her urgent calls for relief, contained in the heart-rending letters before us, until he should extort certain terms from the pursuer, it is difficult not to allow some weight to the pursuer's statements respecting the papers said to have been lost in these circumstances; but there is no occasion to rest any weight upon such considerations; there is sufficient evidence actually before us. The law applicable to the case is the same as was laid down in the case of *Lindsay*, and the evidence is amply sufficient to support our former judgment.

Mr. Charles Ross.—I continue of the opinion I formerly expressed, that there is here evidence of a marriage. The additional proof is of very little weight, but certainly it rather tends to confirm the pursuer's case.

Mr. Tod.—I was formerly the only dissentient from the judgment of this Court, and I delivered my opinion on that occasion with the utmost hesitation, and under the strongest moral conviction that there had been a marriage between these parties. Upon reconsidering the whole case again with the utmost care, I have seen reason to join in the opinion of the majority. One very important feature of the case is to be found in the favourable circumstances in which the pursuer presents herself. Throughout a long series of the most trying circumstances she has conducted herself with uniform propriety. The correspondence seems to prove that there was an honourable courtship between her and the defender; and the expressions which occur in the course of the correspondence are in this view perfectly sufficient to import or infer a marriage. Since the case was formerly under our consideration I have looked into the *Treatise of Swinborne on Espousals*, the principles stated in which I understand to be those adopted in this Court and in the law of this country; and I find that the expressions used in the letters before us are much stronger than some of those which Swinborne states as sufficient to constitute a marriage. That author observes, that 'albeit the words be ambiguous, such as of their own nature enforce neither matrimony nor spousals, but 'by common use of speech induce matrimony; by these words true and perfect ma-

March 3, 1831. the Court of Session, on the 9th of July 1830, refused it, and found expenses due. *

‘trimony is contracted as well as if the words were naturally and properly matrimonial. For example, the parties contracting use these words: I will have thee for my wife until the earth cover mine eyes; for by these words—until the earth cover mine eyes—is commonly understood, until I be dead and buried, and not until the earth cover my eyes while I am yet alive. So it is if the parties say, I will not change thee for a better; or thus—None shall separate us but death; or thus—I will retain thee perpetually with me; or thus—Here I take thee for mine own; with a thousand like instances, wherein the obscurity or ambiguity of the speech hindereth not, but that the common and usual acceptation thereof doth enforce matrimony.’ Now, the expressions which occur here are much stronger. In *Smith v. Grierson*, June and Nov. 1755, (12,391,) an honourable courtship, followed by copula, was held to constitute marriage; and upon the ground assumed in that case I think the pursuer would be entitled to judgment. The whole proceedings here were private, but that was for obvious and sufficient reasons; and as to the honourable intentions of the parties, there is no ground to admit doubt upon that subject. The present case seems to be decidedly stronger than that of *Lindsay*; and we had a case (*Syme*) before us very lately, where a long correspondence was founded upon, and, as in the present instance, the letters of only one of the parties were produced. Some of the expressions occurring in these letters seemed rather to point at taking the lady for his mistress, but there were others which distinctly implied marriage, and so we held it accordingly. These principles and cases, I think, ought to rule the present case. The pursuer has been treated by the defender in the most cruel manner.

Mr. Gordon.—I cannot entertain a shadow of doubt respecting this case; and, were our judgment to be altered, I should tremble for the people of Scotland. The case, in truth, is not nearly so strong as multitudes which have been decided upon the same principles for a period of 300 years. Besides the cases referred to in the papers, I might mention many others; such as *Anderson*, Feb. 23, 1714, (12,676;) *Young v. Arnot*, Decem. 1738, (16,743;) and many others.

In the first place, I hold that there was here an honourable courtship. In the early part of the correspondence there is an offer of the heart in one of the letters, which is founded upon in the libel as a promise of marriage capable of constituting marriage when followed by copula; and the other strong expressions which occur in the letters are just so many of the thousand ways which are mentioned by *Swinborne* as sufficient to enforce marriage.

I consider also, that the subsequent letters contain decisive evidence of the fact of a secret marriage between the parties subsisting at their date. The expressions, ‘Your uncle is my uncle,’ and various others of a similar kind, admit of no other construction. Our judgment will therefore be the same as formerly, and will be expressed in the terms always employed in this Court, viz. that the circumstances proved are sufficient to infer a marriage between the parties. Upon considering the whole of this case, it seems impossible for any one to doubt that the circumstances do infer matrimony.

* 8 Shaw and Dunlop, No 509. At the advising the Judges delivered the following opinions:—

Sir Richard Honyman appealed.

March 3, 1831.

Lord Justice-Clerk.—My Lords, we are now to proceed, in the discharge of our duty, to decide this case, which has been brought before the Court on two several occasions. And sure I am of one thing, that the judgment we are to deliver proceeds upon most full and due deliberation; for your Lordships will recollect that, on advising the case when it came before us on the first bill of advocacy, we thought that there were points on which more light might be thrown. We therefore afforded the parties an opportunity of stating those points in minutes and answers, which were accordingly lodged; and, on considering which, your Lordships thought we should not properly decide this case without remitting to the Consistorial Court, with a view to give that Court an opportunity of considering the cause, and the minute and answers, and some documents which had been produced with these papers, and also of allowing that Court to take into consideration offers of certain additional proof which were made here. The case was accordingly remitted to the Commissaries. They allowed the investigation I have referred to—a proof was led and concluded—the cause was deliberately considered by that Court; and a judgment was pronounced, again adhering to that which they had formerly given, decerning both in the action of declarator of marriage and of legitimacy. Then the cause is again brought before us in a second bill of advocacy for the defender, with answers for the pursuer; and, still anxious to give the parties every opportunity of fully stating this case, a hearing of one counsel on each side took place on a former day; and your Lordships are now to deliver the judgment to which you have come upon this question.

My Lords, in considering this case, it has appeared to me—I will fairly confess—to be a point of importance, on which it is necessary and proper that our minds should be conclusively made up, whether, looking to the judgment pronounced by the Consistorial Court, in applying that judgment to the summons, the objections to the terms and structure of that summons are or are not well founded. Your Lordships are aware of the manner in which that summons is expressed. The objection taken is of this nature, that, in the summons, while the pursuer concludes for decree of declarator of marriage, she confines herself to one particular species of marriage, viz. a marriage said to have taken place in 1813, by declaration de præ-senti between the parties, as husband and wife; and that that is the only ground in the summons on which she lays her case. But, my Lords, after attending as closely as I can to this objection, and being free to admit that, according to the rules of strict procedure which we now observe in this Court, I was at first sight struck with the importance of the objection; yet, upon consideration of the whole of that summons, and the objections taken to it, I am of opinion that they are not good. My Lords, I must take that summons as a whole—I must take the narrative—the detailed intimacy—the honourable courtship there set forth; and then, no doubt—which I do not overlook—there is this specific statement in the body of the summons with regard to the transaction of 1813, on which the relationship between the parties is rested. But I do not stop there; and I go on to look to the continuance of the connexion as there set forth—the birth of children—the correspondence that passed between them; and then I am driven, after all, to the general subsumption of the summons, which is, in my opinion, perfectly sufficient to warrant the pursuer to argue as she is now doing, and to insist that the judgment pronounced is not without the four corners of that summons, but one which, within the summons itself, it was competent to pronounce. The words are, ‘ That from other letters and documents which will be produced, and from facts and circumstances to be

March 3, 1831.

Appellant.—1. The summons is laid exclusively on the averment that the marriage was constituted per verba de præsenti,

‘ proved, it will be made to appear that the complainer and the said Richard Bempde Johnston Honyman, now Sir Richard Bempde Johnston Honyman, are married persons, husband and wife, of each other; and that the complainers, Elizabeth and Alexa Honyman, are their lawful children.’

Now, my Lords, if I am right in arriving at this conclusion, it remains to be considered whether there is evidence now before your Lordships to support the judgment of the Commissaries, which decerns in this action of declarator and legitimacy. Now, I do apprehend that, independently altogether of the concession, which, with perfect fairness, was made on the part of the defender’s counsel, your Lordships can entertain no doubt that, by the law of Scotland, as a marriage may be constituted by an antecedent promise, followed by a copula, that promise may be proved in a variety of ways. It may be proved by witnesses — it may be proved by direct writings — and I apprehend that there is not a doubt, by a train of proceedings and course of conduct that leave no doubt in the mind of any individual, that a serious proposal of matrimonial union was in the meaning of the parties at the time.

I think that doctrine is established beyond dispute by the judgment in the case of Steele, admitting the relevancy of a train of circumstances, without any writing or direct promise, to make out a marriage. I must hold that to be a judgment upon the law as establishing this doctrine; and I know it is noticed by those whose peculiar duty it is to attend carefully to the proceedings of the Commissary Court, and by those who write upon the subject, as so deciding the law. But I apprehend we have another decision in the case of Stuart and Lindsay, which directly shows that a train of conduct, different from what occurred in the case of Steel, whereby the mind of the party was led to this conclusion, and to no other, that, previous to the personal intercourse, marriage was in the contemplation of the parties, entitled the party who had yielded in consequence of this conduct to plead, that she so yielded in consequence of relying upon a previous promise between the parties. That is the case of Lindsay, where, by the defender referring to a part of the Bible treating of marriage, and putting before the woman the statute with regard to the annuities for the widows of excise officers — he being an officer of excise — and undergoing an examination, in which he prevaricated and made inconsistent statements, the Consistorial Court had no hesitation, on the first deposition, in finding the marriage proved. This Court had some doubts on the first deposition; but on considering the second — for he was twice examined — we without hesitation adhered to the Commissaries’ judgment, and refused a bill of advocacy.

Now, that being the rule, we have only to consider whether there be in the present case evidence before your Lordships that establishes that a promise of marriage did take place. This undoubtedly is the cardinal point of this case; for the connexion is admitted, and the fruits of the connexion are admitted to be the offspring of the defender; and, but for the question as to whether there is evidence of a promise, there would be no case here at all.

Now, my Lords, I apprehend, in looking to this question, we must consider the situation, in the first place, in which the parties stood at the commencement of their acquaintance and intimacy. Now, we have here the statements contained in the condescendence and answers, in which papers, in the first place, it is established that the pursuer of this action — against whose character your Lordships will observe there is not the vestige of proof even offered, and unquestionably none adduced, to show

and therefore it is not competent to inquire whether a marriage March 3, 1851.

that she was not of an irreproachable character; on the contrary, the length of her services in the family, and the fact that she continued for so many years to superintend the education of the young ladies, with their mother's approbation, is proof demonstrative that, down to 1814, she maintained her situation in a manner totally irreproachable and blameless. We have it also in evidence — for there is a statement made in the condescendence, and not denied in the answer, which is most material — that, during that period she had saved money, which was deposited in the hands of Sir William Honyman. We have it also clearly proved, that, however it was made, she had likewise money in the hands of Mr. Duncan Stevenson to the extent of £300 or £400, and that accounts for her being supported after the connexion with the defender had ceased.

It is also in evidence, that in 1812, on account, as she states, of ill health — but whether that is correct or not is of no consequence — it is in evidence that she remained in London, and that, while there, the visits of the defender were more frequent; and that he was admitted to visit her three times a day. It is admitted that he visited her in Millman-street, although it is not admitted that he visited her daily; but this is an admitted part of the case, that, after the pursuer went to London, the defender's assiduities to the pursuer were continued. That is admitted by himself. The pursuer states — and with regard to that, I admit that, further than is disclosed by the letters, there is no proof — that, on her return to Scotland, and on his return from Parliament, he continued his assiduities. Your Lordships will observe that, in the 9th article of the condescendence, it is stated: 'The defender having returned from London to Edinburgh in the course of the same year, 1813, he, upon his arrival, and at his first meeting with the pursuer, expressed the most unbounded affection, and repeatedly declared his determination that they should not again part. He resided from the month of April to the end of June 1813 at his father's house, Queen street, Edinburgh, or at Smyllum Park. During this time the defender's courtship and solicitations to the pursuer were incessant. He took every opportunity of being with her in her own room, and of walking out with her whenever he had an opportunity.' Now, in his answer to this article, he says: 'It is admitted that, after the respondent's return from London, his intimacy with the pursuer continued. That intimacy was solicited by herself, and was unavoidable, considering the situation in which he was placed. It is admitted that the defender was frequently with her in walking out as well as in her own room.' These are his own admissions on the record, which are sufficient to demonstrate that, while she held this fair, responsible, and honourable situation in the family of his father, being the instructress of his sisters, he continued that intimacy with her. And I must say here, that I know of no necessity that there is for any intimacy being formed between a male person, a member of a family, and a person in the situation of the pursuer. However respectable, and however irreproachable her character, yet I can see no necessity, and I can admit of none of that which is here referred to, that the intimacy was imposed on this defender from the relative situation of the parties. On the contrary, the proof of the acquaintance and of the intimacy which took place in London, and after their return to Scotland, your Lordships, I apprehend, must hold to be a proof, so far as it goes, of the averments in the condescendence that this party did form that intimacy and that connexion with this woman, which was not necessary, and was not imposed upon him from any of the circumstances in which they were placed; and your Lordships must be of

March 3, 1831. took place in any other mode. But there is no evidence of any

opinion that it was sought by him, and persisted in by him, in the way I have pointed out.

Having continued this intimacy from 1811 down to summer 1813, when it is averred — and there is no proof to the contrary — that for the first time any personal intercourse took place, the next inquiry is — and it is a most important one — What was the real nature and object of this long-continued intimacy which had for eighteen months preceded the connexion? My Lords, the answer to this appears to me to be found in three letters now before your Lordships, preceding any pretence of any personal connexion whatever — I say three letters, because the first two letters carry intrinsic evidence on the face of them that they were written while the defender was attending his duty in Parliament; and as to the third letter, (commencing ‘My dearest, dearest Eliza, if I were not the worst,’ &c.), which is No. 5., your Lordships will find, in the answer to the 10th article of the condescendence, that the defender states that this was not written in April 1814, as had been supposed, but that it was written before he had any connexion with the pursuer. Here, therefore, your Lordships have evidence of the best possible nature, from the defender himself, that this letter is to be added to the others which were written preceding the connexion between the parties.

Now, my Lords, these letters are before your Lordships. I have considered them again and again — I have read them with every possible attention and anxiety, to discover what their real meaning, import, and tendency truly is; and after the most deliberate consideration in my power, I am of opinion that they are reconcilable to an honourable purpose, and to nothing else but to an honourable purpose, on the part of the defender, and influencing the mind of the pursuer. I can discover in none of these three letters the slightest indication that mere seduction was the object in view. There are ardent expressions occurring in them, and it would be most extraordinary if there were not; but I cannot discover an expression in any one of them but such as indicates an honourable purpose, and must have been considered as indicating such purpose.

It is impossible to trouble your Lordships with all the observations that have occurred to me on every one of these letters; but it is impossible not to notice some of them; for, in my apprehension, they speak a language which cannot be mistaken at all.

The first letter in the very first line of it contains a flat and decided contradiction to a statement which you will find made by the defender in the answer to article 8th of the condescendence, where it is expressly denied that he ever asked permission to write to the pursuer. Now, look to the second line of this letter: ‘You will probably have conceived, by the time which I have suffered to elapse since the permission which you so kindly granted me, that I did not intend availing myself of it; but so bewildered and agonized have I been since our separation, that I have been unable to give utterance to my feelings, or form one rational sentiment, even to her who is the tenderest object of my regards.’

Here is a declaration under the hand of the party himself, in the very first letter that he writes, that he avails himself of the permission which had been granted by this woman to write to her. Is this not direct proof that he was the person who had solicited the permission of entering into a correspondence? There are many other expressions in that letter which I might notice; and there is one on which I can put no interpretation, and to which I can attach no other meaning, than that which I have stated, that it was an honourable courtship: ‘If the sentiments,’ he says,

such marriage. On the contrary, the allegation that the words libelled were heard by the appellant's sister has been expressly March 3, 1831.

‘ which I so ardently feel, and have so repeatedly avowed, be reciprocal, hesitate
 ‘ not to say so. I am unable to doubt, after the innocent endearments with which
 ‘ you have favoured me, that it should be otherwise ; yet still, as a solace to my
 ‘ woes, refuse not this solicitation. Write me. Tell me that I am dear to you, thou
 ‘ lovely girl. Would that we were once again together, and nothing shall separate
 ‘ us. I look forward with rapture to our again meeting, and then we must form
 ‘ plans for putting our feelings out of the reach of hate.’ It is supposed it should
 be ‘ fate ;’ but whether it is read the one way or the other the meaning is the same,
 that, when they were together, measures would be taken to put their feelings out
 of the reach of either fate or any thing else. The letter concludes with an ex-
 pression, with regard to which I have not heard one word offered in explanation by
 the defender. The letter talks of raptures, and so on ; and Mr. Cockburn said that
 you must make allowance for the use of such words between a young man and a
 young woman. And all this may be well enough ; but what can be made of these
 words, with which the letter concludes, ‘ believe me, with an attachment strong as it
 ‘ is pure, yours most affectionately ?’ As to this letter, therefore, unless I am to
 change the words, and to say that pure means impure, I must give effect to this ex-
 pression as leading to no conclusion but that of honourable love. What is a pure
 attachment except an honourable attachment ? You will see what is the meaning
 of it in the second letter, where he talks of felicity sanctioned by virtue itself. But
 I am to substitute, I presume, the word pure for impure in the first letter, and in
 the second I am to read vice for virtue. I know of no way, except by substitut-
 ing different words of a totally opposite meaning, by which I can come to any other
 conclusion except that in favour of the pursuer. In this second letter, I will not
 trouble your Lordships with the expressions of rapture which it contains, but which
 are quite foreign to the point I am now inquiring into ; but I cannot overlook that
 part of it in which he says, ‘ Nothing, I trust, will thwart the happiness I look
 ‘ forward to. Nothing shall, nothing can, for it is felicity sanctioned by virtue her-
 ‘ self, and every thing that is tender and amiable. In offering you, my best be-
 ‘ loved, that heart which has for a long time been devoted to you, I have only to
 ‘ lament that it is not a more deserving gift to her to whom it is offered. We will
 ‘ talk over the future when we meet.’ Now, I have already anticipated what I
 have to say here, that, unless I am to substitute vice for virtue, unless I am to read
 the word vice in the prosecution of the sensual enjoyment of this woman, I have
 here an admission under his own hand that the union which he had in view was
 sanctioned by virtue herself, which can only be ascribed to a person proposing
 honourable love. The offer of the heart I do not say of itself is sufficient,
 but you must take that along with the other expressions in the letter to which I
 have referred ; and when you take it in this way, I must put on the words
 their plain meaning ; and I am not entitled, in the face of language of this de-
 scription, to allow him to escape — from what ? — from the lawful effect of his
 own conduct, by saying they have a different meaning from what they contain ; and
 I will not allow the defender to say, when I use the language of virtue, I mean the
 language of vice.

The third letter is also in its terms deserving of consideration. Your Lordships
 will recollect that it first refers to letters she had received. The effect of that I
 shall immediately notice when adverting to the absence of these letters. Then he

March 3, 1831. negated. Accordingly, the Court below did not put their judgment on this ground, but on the ground that the marriage

says, ' You deprive me, thou who art the most dear of thy endearing sex, of a very great pleasure, by prohibiting my delivering your letters to our uncle. Be it so. I obey as you desire.' Nothing was more natural, during the time the courtship was going on, than that she should not choose that their intimacy should be disclosed to their relations; and she cautions him that, although they may be sent under cover to him, ' Do not let them be delivered by you.' But, seeing that the other letters talk of an attachment strong as it is pure, and felicity sanctioned by virtue, it is a most essential part of the correspondence to be attended to, that he says, in this letter, that she deprives him of the pleasure by prohibiting him delivering ' your letters to our uncle ' — not to my uncle, but to our uncle. It applies also to what occurs in another letter, in which he says, ' You have no embraces for any one else but me, not for aunt Fraser or sister Anne. I call them so; for your aunt is my aunt, and your sister my sister!' Now, I beg leave to say, that I am utterly unacquainted with any one instance that can be pointed out, in the history of an illicit amour, or of an intention of seduction — for that is the plea maintained here by the defender — I say I know of no case, and I do not believe there is a case where this was the object, where it can be shown in the correspondence that the party meditating the seductive purpose, or having it in view, applies this language in denominating the relations of his paramour his own relations. I know of no instance of it; and I shall venture to say that there is no instance, in relation to the birth of a natural child, where that event, which is not only matter of the deepest anguish, but even often terminates the existence of the unfortunate female, was hailed with a desire expressed by the father of that child to be present at the birth, to soothe the feelings of the mother, and partake of the joy which such an event will occasion. This is language which, I will venture to say, never was employed by a seducer. These are things always passed over; and, if noticed at all, are topics on which they never enlarge. But here you have this man denominating her uncle his uncle previous to any connexion, and, after the connexion, her aunt termed their aunt, and her sister their sister; and you have the language which I have noticed in allusion to the expected event, the birth of a child, which is mentioned in that letter in language which I say never was before used in the case of an illicit amour.

If such be the import of these letters, which I apprehend clearly to be their import, that honourable courtship was the purpose in view, I say, upon the clearest principles, that he is not entitled to betake himself to this attempt — to say that he used language contrary to the truth, to create an impression which he never intended.

Then, my Lords, we have to consider how much more important the evidence of these letters is rendered by the conduct of the defender himself — the non-production of the counterpart of the correspondence, which, if there is the least foundation for the defence which he now sets up, must have removed every shadow of doubt upon the subject. I mean the correspondence at this critical time, when the courtship was going on, and when in London, and prior to the connexion which took place. There is evidence, and I am sorry for it, for it is out of the mouth of the defender himself, who, when he was examined in January 1826, says, ' that about two years ago ' — I have no objection to give him the benefit of that latitude — he destroyed all the letters which he ever had in his possession. Now, your Lord-

had been constituted by a promise subsequente copula. This, March 3, 1831. however, was quite incompetent.

ships have it in evidence in the (third) letter No. 5. that he says he never would burn the letters, and never could destroy them. But, giving him the benefit of this, look to the last paragraph : — ‘ Trust me, my love, but it shall only be until we meet ; for ‘ I will deliver all your letters into your own possession.’ This is the letter No. 5. prior to the connexion between the parties. Now, is this resolution carried into effect in her presence ? Certainly not ; for in his deposition he admits, that from 1812 they are carefully preserved down to 1824, and then they are destroyed, and for the first time entirely put out of the way.

My Lords, it is said that this party knew nothing at this time of the pretended claims against him — that he thought that the connexion had entirely ceased ; and advantage is taken of the circumstance that the letter in July 1824 is posterior in date to the latitude which he takes in his deposition. But is not one of the facts admitted by him, that the intimacy continued down to 1823 ? And are your Lordships to come to the conclusion, or can any man breathing believe it for a single moment, that this woman, who had acted in consistency with her claims upon the defender all along, had, in 1823, abandoned all claims upon him ? On the contrary, when you come to grapple with that, it appears in the evidence, that although she begs for relief for her children, yet, so far from an abandonment of her claims on her own account as his wife, she writes that letter in July 1824 which is now produced. Does that afford the slightest evidence that she had at any former period abandoned her claims against him ? My Lords, I say it does not ; and I think there is not the slightest vestige of evidence ; and as it is proved that the intercourse continued till 1823, and as, if ever there were letters destroyed under the most suspicious of all possible circumstances, these documents destroyed by the defender stand in that situation — it is perfectly clear to me, on the soundest principles of law and justice, that whatever obscurity may rest on the letters before 1813, the presumption is all in favour of the pursuer ; and that the most favourable interpretation for her must be put upon that circumstance, and upon that correspondence, seeing that all the rest, after having been kept by the defender for seven long years, are put out of the way in the manner I have stated.

Now, my Lords, such being, as I apprehend, the true meaning of the letters that were written prior to the personal connexion, the admitted connexion followed by the birth of children, we come, in the next place, to the other correspondence which we have in this case. And, my Lords, I do, for one, most unfeignedly profess, that after considering one and all of the letters of which that subsequent correspondence is composed, I have been unable to discover any one expression which I could apply to or reconcile with the supposition of this being an illicit amour between these parties ; whereas the expressions in every one of them which has been produced by the pursuer are perfectly reconcileable with the averments she has all along made, that while this union was made secretly, and was to be kept concealed from the father of the defender, yet it was a union of a strictly honourable nature, and was entered into with the full and perfect reliance that it was a matrimonial union.

There is one most remarkable circumstance in this case, which is to be found in the answer to a question put from the Court. It is expressly stated that this unfortunate pursuer's misconduct, or, as it is there said, her guilt, was discovered, and led to her dismissal in 1814 from the family, when it is in evidence she went to the house of a most respectable person in Inverary. Here is a statement that the dis-

March 3, 1831.

2. But there was no such promise as that alleged, or such as is relevant with a subsequent copula to constitute marriage.

covery was made, and that her dismissal was the consequence of that discovery. But I observe, in the concluding part of the last-written documents that have been produced, that it is not till 1824 that the defender, in a communication to his agent, says, 'I have resolved to communicate the whole affair to my father;' and on the next day he writes, 'I have told my father the whole concern; and he will speak to you 'when you come to Smyllum.' Now, my Lords, if that discovery he makes is only of the existence of an illicit amour, I ask your Lordships whether it is a likely circumstance, whether it be credible, or if any human being can believe it, that if that were the whole extent of the discovery, the only party from whom it is to be concealed is the father, while those who are to be made acquainted with it are the female part of the family? My Lords, this leads to a conclusion extremely material, when coupled with the fact that the intimacy was known to some of the female members of the family — the individuals from whom of all others it must have been anxiously concealed, had it been nothing but an illicit amour between the parties.

As to the letter No. 6. (commencing 'My dearest, dearest Eliza, I received your kind letter, &c.'), the expressions there used are, I conceive, perfectly reconcileable also with the opinion I have already expressed, and indicate nothing but a virtuous purpose between the parties; and I must observe that they are perfectly inconsistent with the statement of the defender, in the answer to article 10th of the condescendence, that he does not know when it was written.

As to the letter No. 7. (commencing "My dearest, dearest Eliza, if you think I have forgotten, &c."), in which the word 'wife' is supposed to have been superinduced, I have taken that letter most carefully into consideration. I called for it, and I ordered it to be sent to me under a sealed cover, and I have examined it again and again; and the result of my opinion is just this, that, while there does appear, no doubt, something like superinduction where this word occurs — in the word wife — yet after the closest examination, attending to all that is said by the engravers as to the difference of the ink — the slope — the writing of other words and other letters in that letter — I do not think that superinduction was made by a different hand from that which wrote the other parts of the letter. If you look at it you will see that a difference occurs in other words as well as in this in regard to the ink — which does not weigh a feather with me, although all the engravers on earth were to swear to it — there are other words written in blacker ink as well as it. I look just at one word, 'frequent' — that is in blacker ink than all the rest, and the next word is in paler ink.

You will observe that these engravers are by no means at one — they will not swear that, although some of the other words seem to have been gone over and retouched, they were also done by a different hand; but their opinion goes to this, that the alteration on this word wife is done by a different hand from that of the writer of the remainder of the letter. Yet it is merely their opinion; and therefore all I shall say is, that I am not satisfied that that is established. There is one word which now reads 'from,' but which, it is as clear as the sun at noon-day, did not originally read 'from,' but 'of;' and there are many more examples in which, for the purpose of making it correct, alterations have been made; but are we to presume that what was made merely to correct the grammar, and make the letter more correct, are all superinductions, and made by a different individual? I therefore say, that I am not satisfied that there was any superinduction by a different hand;

The appellant no doubt made use of ardent expressions of endearment, but that is not sufficient; there must be a paction

March 3, 1831.

and I will add, that no engraver on the face of the earth will convince me on a point of this kind of moral evidence. For does that word 'wife,' which you see in that letter, not stand in keeping with the rest of the letter? My Lords, I say it does. It is in this letter in which these remarkable expressions occur to which I have called your Lordships' attention. It is in this same letter that he says, 'How are we to continue to carry on our correspondence?' 'Tell sweet Jemima to write, and you can put a letter inside.' My Lords, is such audacity to be permitted to be assumed as to suppose that this person, writing to his paramour, is to do so through the assistance of his sister? Is it possible for one moment to hold this, when the language is perfectly reconcilable with an honourable connexion? Then look to the next words: 'Tell me, my Betsy, if you think there is any likelihood of the event which you and I talked about taking place. If so,'—What? 'Go into concealment and hide your shame' would have been the words of a man to his paramour. 'I shall give you all the money I can; but go and conceal it from all the world.' This is not the language; but, 'if so'—if the event does take place—'you must come directly. I must be with you. I,' the father of the illegitimate offspring, forsooth! 'must be with you, to comfort and soothe you, and to partake of the joy such an event will excite.' Is it a surprising matter, therefore, that in a letter containing such expressions there should be found the words, 'my beloved wife, take care of yourself?' So far from any thing unlikely in the expression, it is just what would have been expected to have passed between the parties in the situation in which they stood to each other as married persons. And what does this letter conclude with? Why—'I dread a discovery of this epistle.' But, were there nothing to be found in it different from letters to his mistress, why dread so much the discovery of this more than any other letter? If it contained only the fashionable language of seduction, of which he is not to be ashamed, according to his own statement, why dread the discovery? and why so anxious that the letter should be concealed? This expression, therefore, is just in correspondence, and consisting with the relation of virtuous union between the parties; and all that I can say is, having dwelt so much on this epistolary correspondence, and put the interpretation on the letters which I think their words imperatively demand—all that I have to say is, that, with regard to the language so used, if we were to put on them the construction which the defender maintains to be their import, your Lordships can do so only by imputing to him direct insanity; and that he uses words in one sense which to every other person mean something else and entirely different. Is that, I ask, what we are entitled to do?

My Lords, I am quite aware that a considerable degree of weight was attached by Mr. Cockburn to the total absence of a letter referred to by the pursuer in her letter of the 14th July 1824, in which she expressly states, 'I had a letter from your sister,' saying so and so. Mr. Cockburn said, Where is the vestige of any such letter? it has not been produced. And certainly that is true. Now, although I do not say that it amounts to perfect demonstration that this letter once existed, yet it does appear to me to be a circumstance on which the pursuer is entitled to found—whether decisive or not, your Lordships will determine—that we have clear proof that some of the letters once in her possession have been lost. For I cannot agree with Mr. Cockburn that the new proof has been attended with no effect in this case. I cannot agree with that, although I agree that there is great deal of hearsay introduced as to sending a man to Dalkeith, and telling what account he

March 3, 1831. or contract to enter into marriage; and it would be extremely dangerous to sanction mere amatory expressions as equivalent to

got of what another person had said. I think that is no evidence at all, and lay it entirely aside; but I go to the evidence, which, I say, is clear evidence, of the sale of the *escritoire* containing papers when the pursuer was lying in jail, and had no control over the effects which were sold for the pitiful debt of this woman. It is in evidence that this *escritoire* was emptied of its contents, and a great many papers and letters were thrown upon the floor. The fact of that sale, at a time when this woman could give no directions as to the protection of these documents, is proved beyond the possibility of doubt. Now, attend to the fact, that on 14th July 1824, after her ineffectual attempts to bring one farthing out of the pockets of this defender, to support herself and her children, she makes this most powerful appeal to his feelings, after endeavouring to excite his feelings for his children, in direct contradiction of the statement in the bill of advocacy, that the communication took place without the least regard to her own status as his lawful wife. That is argued throughout the whole bill of advocacy; but the second proof has demonstrated that there is not the slightest foundation for such a statement, and shows that not one farthing would be advanced by the defender unless she would renounce those claims against him. Now, at this distance of time, when she is unable to recover these letters, which had been scattered on the floor at the sale of the furniture, it is important to remark that about July she writes this letter, which contains the exposition of her case, and the general statement of her claims. It is a letter that is in truth embodied in the summons; and it is most material to observe, that the defender here was warned that it would be preserved, to be put into the hands of the person to be employed to vindicate her rights. My Lords, it is in this letter that she says, 'I have a letter from your sister,' in which she calls the pursuer her dear sister; and this, coupled with the proof that the pursuer was deprived of the power of looking after her property, aids extremely the case; for it shows, while this letter was to be preserved on the one hand, that it is next to incredible on the other that she should have asserted in it that she had a letter from his sister if she had not received such a letter.

The second proof appears to me important in other particulars; for, does it not shew the probability of the statement which the pursuer had all along made, that, while the situation of the parties was to be concealed, she still went on to live on her own money? The evidence of Stevenson proves that he remitted £200 to her, when residing in York, by London bills, and that he paid her the balance in 1821, when she was residing with her aunt, Mrs. Fraser. The second proof, therefore, I think important in that respect also.

My Lords, the interruptions and renewals of intimacy between these parties, with the circumstances in which this woman was compelled to break her silence, appear to me far from being unfavourable to her. In these letters, while she makes the strongest claims in behalf of her children, she keeps the silence all along, and does not betray the confidence, she says, the parties mutually reposed in each other. It is only when these demands are resisted that she is driven to the necessity which renders it impossible to keep silence any longer; and therefore she breaks it, but not till she is driven to it. I am of opinion that, so far from there being any thing inconsistent in this conduct — on the contrary, while you see her maintaining herself for some time by her own labour, and on her small capital, the silence was sacredly preserved — it is perfectly consistent with the statement that the marriage

a solemn promise of marriage. The appellant's letters only convey an indication of that attachment which a young man

March 3, 1831.

was to be concealed as long as possible, and was only broken when she could no longer conceal it.

Therefore, my Lords, having so very fully explained the grounds of the opinion which I have formed — that there is sufficient evidence of an honourable courtship — that the letters are reconcileable to nothing but an agreement to marry prior to the personal connexion, and that those subsequent ones are equally reconcileable with a virtuous and honourable union — I am of opinion that the judgment of the commissaries is well founded, and that your Lordships should adhere to that judgment, decerning in the declarator of marriage and legitimacy. And, my Lords, while this judgment will do justice to the parties by establishing their several rights, it will, I trust, afford a salutary lesson to those who, with undue purposes in their hearts, use language, and conduct themselves in a manner that can lead to nothing but the conclusion that they had honourable courtship in view, and, if they violate the chastity of a female, that can be followed by nothing but a judgment of this Court, vindicating the rights of the injured woman, and finding her entitled to the status of a married person.

Lord Glenlee. — I cannot say I am quite satisfied with the judgment of the commissaries. I do not go so far as to say that a direct promise by explicit words must be proved to have taken place, but there must be evidence of an actual promise having passed between the parties. Now, as to the evidence of the letters, I have some difficulty in thinking that they establish such a promise. There are expressions in them which, being interpreted in a certain way, may be held to imply a promise of marriage; but I should like to see any case whatever, in which, upon an interpretation such as this, a promise has been held to be proved.

I acknowledge that it is admitted law that there is no necessity for an actual promise by words being proved, and that there may be a virtual promise implied sufficient to make out a marriage by facts which, if once established, show by necessary inference that there was a promise; and in the case of *Stewart and Lindsay*, which was a very strong one, that doctrine was certainly held. But then it was from facts which were proved there; and the matter of fact which was established was, that the man had handed over a Bible, and shown the woman a chapter in *Corinthians*, treating of marriage, and of the duties of husband and wife, and bid her read it, and at the same time he showed her what were the provisions for the widows of officers of the excise. These facts being established, the inference was just a matter of necessity from them that marriage was intended. It was just the same in the case of *Smith v. Grierson*, which was the first that established the principle that a promise might be made by implication without any direct words. In that case it was objected, that you could not allow a promise to be proved by witnesses; but the plain answer was, We are not going to prove a promise at all, but we are going to prove facts — the courtship being notorious — the party having told his companions that he meant to marry this woman, and having otherwise conducted himself so as to make the inference from these facts a matter of necessity that he meant marriage. If a man admits that he desired the banns to be published, or does something equally unequivocal, there the admission, from the mere matter of fact, of itself supports the irresistible inference that a marriage was promised. It is

March 3, 1831. may form for the person of a young woman of the same age without any intention to enter into matrimony. The only

a very different thing, however, when it is not on matter of fact that the conclusion is rested, but merely on the interpretation of expressions in letters which some think are only applicable to the married state, and not so applicable to a different connexion. The meaning of such expressions is always a matter of mere arbitrary interpretation; and their use, purport, and force must depend much upon the various habits or tempers of the persons who employ them. Now, where the question has been tried on that sort of evidence alone, I am not aware of any case in which it has been held sufficient that expressions have been used which may be thought applicable to the married state; and it would be attended with very dangerous consequences, that a man may be married merely because he has used one word, whilst another, because he has omitted that word, is not married. It does lead to a great difficulty in my mind to find a marriage solely and entirely on evidence of this sort. The other mode, of inferring a promise from facts proved, is a very different thing, when the facts established are such as necessarily to show that a promise must have passed. If, in place of writing these letters, and using the words that 'it was a union sanctioned by virtue,' and other vague expressions, he had said, Read that chapter of Corinthians — which was referred to in the case of Stewart — I think the case would have been different, that chapter necessarily implying that a matrimonial union, and nothing else, could be in view. My apprehension of the law of Scotland is, that the previous promise must be established substantially from facts that can lead to no other conclusion, if the actual promise be not proved itself. My idea, in short, is that, in order to constitute a marriage by promise subsequente copula, there must be evidence of a promise, either express or implied, as a substantive fact complete in itself, without reference to any thing that follows afterwards. If there is a direct promise, it should be of that kind that would be the foundation of an action of damages for breach of promise of marriage if the party should break it, supposing no copula to have followed upon it. And in the same way, if it is attempted to make out an implied promise by evidence of facts and circumstances, there must be proof of such a courtship as would be the foundation of a similar action of damages if the man should afterwards break it off, and marry another woman.

I am not so entirely satisfied of the import of these letters as to think that they can be considered only as the letters of a respectful lover to his mistress, if I may use such an expression. I cannot see, for instance, that, because he says that he avails himself of the permission given him to write to her, it therefore must follow that he asked that permission. The expression used would have been the same if she had volunteered that permission.

I am not going to make a commentary on these letters; but it is quite evident from them that the intimacy had gone a certain length, probably farther than the bounds of very respectful love would allow, before the earliest of them were written. He says in one of them, that 'so bewildered and agonized have I been since our separation, that I have been unable to give utterance to my feelings, or form one rational sentiment even to her who is the tenderest object of my regards. If the sentiments which I so ardently feel, and have so repeatedly avowed, be reciprocal, hesitate not to say so.' That certainly implies that matters had made a certain progress between them. And what was that progress? He goes on to say, 'I am unable to doubt, after the innocent endearments with which you have favoured

expression which can otherwise be construed is the one written upon an erasure; but the rule of law in regard to vitiated

March 3, 1831.

'me;' and then, 'Would that we were once again together! and nothing shall separate us. I look forward with rapture to our again meeting, and then we must form plans for putting our feelings out of the reach of hate.' Then, in the second letter, he says, 'I received your most welcome letter this morning. Well does it deserve an immediate acknowledgement,' &c.; and then, 'Soon, however, I trust we shall meet, and one soft embrace will repay me an age of anxiety and distress.' That certainly implies that the attachment had already made some progress towards a consummation. If he had left out all that related to 'innocent endearments' and 'soft embraces,' there would have been more in the expressions of purity and virtue. And when he talks of 'felicity sanctioned by virtue herself, if he had stopped there, in like manner there would have been more in it; but then he goes on to add, 'and every thing that is tender and amiable,' and such like nonsense. With regard to the expression of what I was going to call the religious feeling, that he would love her not only while he lived, and even after her death, but that he would love her even after his own death also, my Lords, it is quite clear that this is absolute nonsense. It is such a nonsensical sentiment altogether, that I do not see that we should go upon the supposition of honourable love more than the other to account for it. As to the destroying of the letters, I admit it is perfectly impossible to get quit of the suspicion that he destroyed them because he thought they would do him harm; and he has certainly much reason to be ashamed of the whole correspondence. But I think that she also has a great deal to answer for in not having preserved more than she has done; and the same suspicion attaches to her, that if more of his letters to her appeared, they would not tend to support her plea. The reason she assigns for not producing many of his letters is, that they were lost at the rousp of the furniture which took place, and I see that it is now impossible to trace them; but I do not see that at the time, in July 1824, when the negotiation was going on, there was any impossibility of recovering them. If she had sought for them, I think she might have been able to trace them, especially as Mrs. Wilson states that she had seen and read the letters, which seemed so strong that the witness's impression in favour of the pursuer's statements was confirmed. Why did she pick one letter more than another? and what induced her to take better care of the letters that have been produced than of those which were lost? I am satisfied that the non-production of one of these letters in particular is not accounted for in any way whatever. I mean the letter in which she says she was called by Miss Jemima Honyman, 'her dear sister,' and 'her dear Lady Dicky.' In the letter of July 1824, after the rousp of her effects, she says most explicitly that it was in her possession then. If she ever had that letter, it must still have been extant and ready to be produced; and Miss Honyman denies and negatives every question that is asked at her. It is a very extraordinary circumstance, likewise, that from 1815 to 1821 all intercourse between the parties should have ceased if they were man and wife. According to her averment, the matter was quite well known, not only to Miss Honyman, but to Lady Honyman too; and the pursuer says it was also spoken of in presence of Mrs. Fraser. Now she has failed in her proof of that altogether — she has not proved a word of it. To be sure she did not examine Lady Honyman; but still that is her statement, that there was no concealment whatever of the situation in which these parties stood to one another.

March 3, 1831 writs is, that the words are to be held *pro non scriptis*, and consequently must be thrown out of view. The conduct of the parties also shows that they had no matrimonial intentions.

Upon the whole, it is impossible for me to go through the correspondence without being impressed with the conviction that these parties never looked upon their connexion from beginning to end as that of married persons, or in any other light than that of an illicit amour. Now, I know that it is very true, that where an explicit promise of marriage is proved, and copula follows upon it, a woman's ignorance of her legal rights, or the real nature of the connexion which then takes place, will not prejudice her cause, nor prevent the legal and necessary effect following from the copula which takes place after an admitted or explicit promise has been clearly proved. Nothing could be a stronger illustration of this than the case of *Pennycook v. Grinton*, where the woman was so ignorant of the real nature of her rights, that she first raised an action of damages for seduction, and was afterwards allowed to desert her libel, and to bring a new action for declaring her marriage; but it appears to me to be very different when a promise is attempted to be made out by implication and by the understanding of parties. In that case it becomes a necessary and relevant inquiry, What did the parties really understand to be the nature of their connexion, or the true import of those expressions by which the promise of marriage is said to be implied? It is very true, that where you have a direct promise, the law will not allow any inquiry into the understanding of parties as to the nature of the connexion which afterwards takes place on the faith of it; but where a promise is only implied from indirect expressions in the course of a correspondence which does not necessarily infer such a promise, but may only be interpreted to mean such, I cannot avoid inquiring what was the real understanding of the parties at the time as to the import of these expressions.

I forgot to take notice of the letter in which the word 'wife' is written on an erasure. No doubt, if this were genuine, and written in such a way as we could pay any regard to it, there would be an end of the case. All, however, that I have to say on the subject is, that I do not know, nor feel myself called upon to inquire by whom or in whose hand-writing the alteration was made. All that I see is that the word is written on an erasure, or has been altered, and, being so vitiated, can make no faith in judgment; and the Court is therefore not entitled to pay any regard to it.

Lord Pitmilley. — My Lord, in forming our opinion on this case, the first point to be disposed of is the objection in point of form taken to the summons, that the ground on which this action is rested has not been proved; and the conclusion from this objection is, that the action should be dismissed, reserving to the pursuer to raise another action. My Lord, I entirely concur with your Lordship and with Lord Glenlee in opinion that this defence is not well founded. My Lord, it is perfectly true that the summons sets forth in its narrative facts which are not proved — it sets forth a marriage *per verba de præsenti*, which is not proved, and which could not be proved, as the parties were in private when that is said to have taken place. The summons then sets forth the birth of the two children, the cohabitation, and the correspondence. My Lord, I think the construction which the Dean of Faculty put upon the summons is correct — that you must look to the subsumption of the summons, which is perfectly complete to warrant the proof which has been led; and, my Lords, I observe that in the defence, which is signed by two very able

Respondent.—1. The summons is sufficiently broad to comprehend every mode of constituting marriage. The leading March 3, 1831.

counsel who were then at the bar, my Lord Fullerton and my Lord Moncrieff, that objection was not originally stated. The objection there stated is rather that the summons was not sufficiently explicit. That is stated in the beginning of the defence; and towards the conclusion it is said, ‘With regard to the other letters and other documents alluded to in the summons, and the facts and circumstances to be proved, the defender can only say, that when the pursuer explains the passages in those letters, and proves the facts and circumstances by which she states, ‘It will be made to appear that the pursuer and the defender are married persons,’ he is fully prepared to meet the pursuer upon these points.’ So that he does not state this formal objection to the summons, but admits that it is perfectly correct, and that he is ready to meet the pursuer when the proof is brought forward. I am, therefore, of opinion that the objection is not good. Now, my Lords, when we come to decide upon the merits of the case, I think there are two different duties to perform. In the first place, we must consider the evidence in the manner in which it would be incumbent on a jury to consider it. The connexion between the parties and the birth of the two children is acknowledged; and I think we must make up our minds on this issue, On what agreement — on what implied contract did this connexion take place? Was it on the footing of an illicit amour? or was it on the footing of the pursuer being the wife of the defender? After having fixed this point of fact, our next duty as judges is to apply the law to the verdict, in doing which we must consider whether this understanding — this agreement — this implied contract — is sufficient to constitute marriage by the law of Scotland.

My Lords, it appears to me, in regard to the question of fact, to be but fair to the pursuer to keep in view the very peculiar difficulties in which she was placed in bringing forward her proof. My Lords, this connexion, whether lawful or unlawful, was to be kept secret from every body. That he had the most urgent motives for this, whether the connexion was lawful or unlawful, is most amply proved by his letters; and if we believe the pursuer, there were the most extraordinary exertions made by her to keep this secrecy that ever I heard of in the whole course of my life — they are almost incredible. The anxiety to keep it secret is perfectly clear. It might have happened that Miss Honyman may have heard something about it; but she was the only person that could be brought forward as a witness. The pursuer has failed in that. But it is not a case in which I think we are to look for much parole proof — it is not a case that admits of it.

When we look to the letters, we cannot but remark, in the first place, that these letters are naturally obscure; and, in the next place, that they are not dated, and that many of the pursuer’s letters have been destroyed. I do not see any thing sufficient to account for their destruction — I mean the pursuer’s letters — and I rather agree with your Lordship that the defender has not cleared himself very satisfactorily of the destruction of these letters. But I do not care much for that. All I want to notice is the fact of these letters having been destroyed, however that took place. Then, in the next place, in regard to some of the defender’s letters in the pursuer’s possession, they were also lost by the sale of a chest of drawers and escritoire; so that really this pursuer lies under the most important difficulties, in bringing forward her proof, that a person can almost be placed in; and I think it is impossible to do her justice without keeping that in view. As to the later investigation that has taken place, I think it does not make so very material an alteration on the

March 3, 1831. object of it is to have the marriage declared ; and under a summons having that object it is competent to admit every species of

case as I expected it would have done. I was struck with the contrary averments of the parties, and thought that the averments might be proved, or that an inference almost equally decisive would have arisen from a want of proof of them. That, however, does not seem to have been the case. But I cannot throw the additional proof out of view. I think, first, the evidence of Stevenson very important, in showing that the pursuer had a considerable sum of money to support herself and her children. As to Mrs. Wilson, there was much inadmissible evidence taken from her, and I would be ashamed to lay any weight on that. Besides being a creditor of the pursuer, and having read the papers, her evidence is almost all hearsay or inference, which I can give no weight to ; but let it not be forgotten that it was the defender who insisted for the examination of Mrs. Wilson. On page 2d in the answers to the minute, he says, ' No reason whatever has been assigned for not examining ' Mrs. Wilson ;' and then he goes on : ' The truth is, that neither Mrs. Wilson nor ' Mr. Hamilton were examined, because the pursuer very well knew that they could ' give no evidence in support of the averments which she ventured to make,' &c. But there is one point of the case as to which, if she was admissible at all, she was very important. It was asserted by the defender, that the pursuer had told Mrs. Wilson, in the presence of the defender's agent, that she had been married to the defender by a clergyman whom she could at any time bring forward. If that had been true, it would have been very much against the pursuer. But Mrs. Wilson's evidence, if we are to take it into view at all, clears that up distinctly, and removes all impression from my mind against the pursuer on this subject. My Lords, I have noticed these difficulties under which the pursuer lay in bringing forward the proof ; but, with all these difficulties, we must now say whether, laying aside equivocal expressions, there are leading features in this case on which we may safely rely in resting our judgment. Now, before looking to the letters at all, it appears to me, as it did to your Lordship, right to attend to some of the statements made by the defender in the condescendence. Your Lordships will observe that, when the defender came home from the East Indies, about September 1811, the pursuer states that she was in the family of his father at Smyllum. Then, in answer to article 3d of the condescendence, he says, in answer to the statement that the defender had paid particular attention to the pursuer, ' This is denied. On the contrary, the respondent was, ' immediately on his return home, courted by the allurements and advances of the ' pursuer, which, considering his age, then only 24, it was impossible for him altogether to repel.' Then your Lordships see that, on the 12th page, he gives his admission as to the date of the first connexion. He there says, ' It is true that, some ' time in summer 1813, the respondent did obtain possession of her person without ' the slightest resistance on her part, and without any promise of marriage on his ; ' and this connexion was afterwards continued ; but it is denied that they ever lived ' or cohabited as husband and wife.' Now, if all this is true, I would beg leave to ask how it is possible to account for it, unless we take these letters into view, and see if we can glean from them what the understanding of this woman must have been. Here is this courtship, according to his account, going on for two years, and the lady during all the time making advances to him ; and then after two years she yields all at once to him without any solicitation on his part, without any promise of marriage at all. My Lord, is this credible ? or is it possible for any body to believe it ? My Lord, it is, if we look to the letters ; but it is not credible unless we look

evidence, to the effect of arriving at the conclusion libelled. March 3, 1831.
 Besides, after reciting the *de præsenti* words, it libels, "that from

to the letters; it is contrary to every notion we can have of human nature. We do not forget the opportunities he had in Milman-street, nor his impassioned addresses for two years; and, when we look to the letters, and find the passages in them which are admitted to have been prior to the connexion, I think there is no difficulty at all. I am speaking of the matter of fact at present, as to the pursuer's understanding when she entered into the connexion, and not to the law at all; and I say that the letters clear up all the difficulty at once. Your Lordship has referred to them, and I shall not go over them again in detail. He talks of an attachment strong as it is pure—he makes an offer of his heart—speaks of the felicity sanctioned by virtue itself—he calls her connexions his connexions, and speaks of her uncle as 'our uncle'—he tells her that she has no embraces but for him, not even for aunt Fraser, or sister Anne. And then there is the most important fact of proposing his sister as the medium of communication between them. What construction could this woman put on these letters? Was it ever heard of that language of this kind was used for the purpose of bringing about an illicit intercourse? I do not believe it ever was. But a most important question is, not what he meant, but what effect these expressions must have had on the pursuer, and what she must have understood them to have meant? If he did mean these expressions to have a different meaning, that cannot avail him in this case. It is impossible to forget the rule laid down—so emphatically laid down—by Lord Stowell, in the case of *Dalrymple*, that a party would be 'bound to answer to demands where he tries to impeach his own expressions. First, he must assign and prove some other intention; and, secondly, he must also prove that the intention so alleged by him was fully understood by the other party to the contract at the time it was entered into. For surely it cannot be represented as the law of any civilized country, that, in such a transaction, a man shall use words expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to void a contract which was differently understood by the party with whom he contracted.' My Lords, if it were possible to believe—and I do not believe it—that there was any sinister object in view when these letters were written, I say it would not avail the defender; for the question is, What impression did they produce on the lady? And if they did produce such an impression as indicated a pure and virtuous union, he cannot be permitted to say that he did not mean them to be so understood. My Lord, when I put the question, What was the understanding of this woman when the connexion took place with the defender?—what was the contract then entered into?—when I put that question to myself as a jurymen, I cannot hesitate as to the answer. I cannot believe that she entered into it as an illicit amour; it is contrary to human nature to suppose so. Whatever effect it may have in law is a different question; but I am satisfied that she must have entered into it with the understanding, and that it must have been the agreement of parties, that it was a lawful connexion.

Now, if this was the understanding when the connexion took place, the next point is as to the application of the law; and certainly the question of law is a very delicate one. I dislike very much introducing any thing like uncertainty into the law of this country on any point, more especially on so important a one as that of marriage. But yet, my Lord, my impression of the evidence is such, that I do not find much difficulty in applying the law to this case. I have always understood that

March 3, 1831. “ facts and circumstances to be proved it will be made to appear” that the parties were married persons.

there are no precise formal words necessary to constitute a promise of marriage *per verba de præsenti*, which is of itself not a marriage, but only induces an obligation to solemnize marriage. It appears to me that the decision in the case of Lindsay must have been founded on this principle, and that this has been the principle of the law of Scotland ever since the case of Grierson, and the other case in 1755 — that it is enough, without any precise form, that it is made out a promise was given. It appears to me that, if the case of Lindsay was well decided, it is impossible to doubt in this case. I cannot think that the reference there to the chapter in the Bible about marriage was so clear and direct as the expressions we have in this case; and I cannot approve of the decision in the case of Lindsay if I disapprove of the decision of the Commissaries in this case. I can see that it is often difficult to distinguish between a course of seduction and a promise of marriage *subsequente copula*. It may be observed, however, that it is a dangerous engine of seduction to talk of marriage at all; and it can be of no use, except to induce the female to yield; and if, in place of vague and general remarks upon marriage in general, applicable to other parties, they apply these expressions to themselves, I should find it difficult by the law of Scotland to say that marriage was not established. This is just the difference between the present case and that of Lindsay. The parties there were speaking of marriage no doubt, but they were speaking of it with reference to other parties; but here the expressions are not about other parties, but about the parties themselves, and in one of the letters he says that she is his wife. I shall not say much on that letter, however, although I agree with your Lordship in the remarks you have made upon it; but I say, in the other letters, he makes a declaration in his own case, which must have been understood as a promise of marriage, and that is followed by intercourse and the birth of two children. I, therefore, am of opinion with your Lordship, that the Commissaries' judgment is well founded. I have not found any case in which a different doctrine has been sanctioned, unless it be the case of Hyslop, which, however, I may say, I think is at least a doubtful decision. I shall not detain your Lordship longer by farther remarks. It appears to me, on the whole, that the Commissaries have decided according to the principles of the law of Scotland, and that this bill of advocacy should be refused.

Lord Cringletie. — My Lords, it would be extremely wrong in me, after what I have heard, to take up the time of the Court in delivering my opinion. I perfectly agree in the opinion which your Lordship has just heard delivered, and in that of your Lordship, with every word of which I concur. My Lords, I may merely remark, that it is expressly libelled in the summons that the defender did promise to marry the pursuer. There is at the bottom of page 4th of the advocacy the most complete libel of a promise of marriage. And then in the conclusion of the summons she says, ‘ That from facts and circumstances which will be proved it will appear that they are married persons, husband and wife.’

In his correspondence, when he talks of the connexion continuing to be the same, how can that be if they were not married?

As to the word ‘ wife,’ which is said to have been superinduced, I must say that I have eyes as well as an engraver has, and I have looked at that letter earnestly and attentively; and I do think that, if any alteration has been made on it, it has been made by the person who wrote it. That is my impression; and I am sure of it — that is more. Writing is not to be criticised in the way which has been followed by

2. It is not necessary that there should be a paction or contract March 3, 1831.
to enter into marriage, followed by a copula, to constitute matrimony. If there be a promise, or what the law from evidence holds to be a promise to enter into marriage, and if that be followed by copula, the rule is, that the matrimonial consent has been interposed, and the marriage constituted at the time of the copula. In the present case the written documents, and the facts and circumstances, prove that the parties had nothing else except matrimony in view. The respondent was a person of unimpeached character—of respectable parentage—of good education, and in every respect (except, perhaps, in that of birth,) equal to the appellant. She was entrusted with the charge and education of his six sisters for several years, and the attempt made to depreciate her character utterly failed. The letters previous to

the engravers; but it is by a general look at the character and appearance of the writing—that is the way in which it is done by a judge. They do not enter into a minute scrutiny of the strokes, and a minute examination of each turn. Suppose any one were asked about my handwriting in this Court, nobody would look at an ‘l,’ an ‘f,’ or an ‘e,’ or an ‘r;’—it is by the general appearance that every man judges.

I will show any body in this very letter who chooses to look at it an ‘f,’ precisely identical with that which occurs in the word ‘wife.’ The engravers say that other parts of the letter have been gone over as well as this word. Would you say that the pursuer did that too? Would you stultify her when there was no occasion for it? That part of the engravers’ testimony, however, would go to prove this. Furthermore, I think it is in perfect consistency with the previous promise of marriage and with the rest of the letter itself. It is the only letter—which is a curiosity—in which he says, ‘I dread it being discovered.’ Now, I would like to know why he dreaded discovery of this more than the other letters. It would be a discovery, to be sure, that he was married, if it fell into his father’s or mother’s hands, if the word wife was there; but what do you see in the letter, except that word, more than in the other letters? But I need not take up the time of the Court. I think the correspondence proves, not only that there was a promise, but that the promise was held to be executed.

Lord Justice-Clerk to Lord Glenlee.—What does your Lordship say to this letter?

Lord Glenlee.—All that I intended to say was, that I do not profess to be a judge as to who had made the vitiation, but that it was vitiated; and being a vitiated document, it was not competent to found upon it, or enter into the question how it had been vitiated.

Lord Justice-Clerk.—My Lords, if I were satisfied that it was a forged or vitiated document, I not only would throw it out of view as an argument for the pursuer, but would think it a most important document against her.

Note.—These opinions were taken by a short-hand writer employed by one of the parties. A copy of them is inserted in the Faculty Collection; but, to render this report complete, they have also been introduced here.

March 3, 1831.

their first connexion show that at least she was made to believe that the appellant's attentions were virtuous and honourable, and the extraordinary fact that he destroyed all her letters immediately previous to the institution of the action demonstrates that she so expressed herself to him, and regarded their union as that resulting from matrimony. Although the words "be-
"loved wife" are written upon an erasure, yet it appears from the letter itself that that erasure must have been made by the appellant, and the words written by himself; besides, they are in accordance with passages in other letters, where he speaks of "our uncle" and "our aunt."

LORD CHANCELLOR—My Lords, although this case, which is of great importance to the party, has been sought to be made of equal importance to the law of Scotland, I cannot accede to that; for I do not feel that the decision which I shall consider it my duty to recommend your Lordships to give, on the merits of the case, will at all either impeach or affirm any of the known and established doctrines of the Scotch law. I regard it, on the contrary, as a mere question of fact; and it is only in order to protect myself against its being supposed, and to guard your Lordships against its being understood, that what I shall recommend to you, and what you may be pleased to adopt upon my humble recommendation, in any way alters those principles which have been long established as the marriage law of Scotland, and which it is of the utmost importance to preserve unchanged, undisputed, and unambiguous, that I shall state at greater length than I would otherwise do my opinion on the subject.

My Lords, two questions were raised in the Court below, and two questions have accordingly been argued here. The first is, that the summons does not raise the question in a competent shape, inasmuch as it sets forth a marriage per verba de præsenti, and inasmuch as that is abandoned in the evidence, and all the reliance is placed for the respondents (pursuers below) on the promise and subsequent cohabitation. But, on looking into the summons, I find no sufficient foundation for this preliminary objection; and that because there is enough set forth, according to the style in which summonses are oftentimes drawn (though I must say I have not often seen a more inaccurate or more loosely drawn summons than this). In this case the whole matter is brought in, and all the ways in which a party may be married are set forth, without very distinctly specifying on which of those several ways it is that reliance is mainly placed in the latter part of the summons; still within the four corners of the summons, I find enough to let in evidence of

March 3, 1831.

the kind of marriage now relied upon. The next question, and the only one remaining to be considered, is, whether, in the marriage now relied upon, you have a promise, with a subsequent copula or cohabitation? Now whether the Scotch law is to be continued or not—whether it shall still be the law that so perilous an experiment is to be tried on society, and upon the most impetuous passions of mankind, as enabling two young persons, at twelve and fourteen years of age respectively, (who could not by the law of Scotland, the one for nine years more and the other for seven years more, competently, by the most solemn and deliberate act, affect in any one way a single half-quarter of an acre of their landed property,) to do an act which shall unite them in holy matrimony, create an indissoluble union for life, lead to the procreation of issue, and by that procreation carry to the issue, it may be, of a common prostitute—(I am of course putting an imaginary case)—all the landed estates of which a man can be seised, and all the honours and dignities which a man can inherit from his ancestors; whether it be fitting that in any country such should ever, in common consistency, be the law—whether, in common expediency, it is desirable that this should be the law—and that in one moment, while the passions are excited, and the reason, if ever it has dawned in the young persons at all, is by those passions laid asleep, without the interposition of the least delay to give time for reflection, they should be capable of binding themselves for life by the most solemn of all human contracts, with the largest of all possible municipal and political effects attached to it—whether it be thought fit and proper that this state of things should continue, I do not stop to inquire;—suffice it to say that such is the law of Scotland; and it is as certainly the law of Scotland that a marriage so contracted is valid as it is the law of Scotland that such a marriage is irregular. It is an act to be visited with censures of an ecclesiastical kind—it is an irregular, but it is a valid marriage, and has all the consequences, touching the rights of the parties mutually, and touching the rights of their issue and its legitimacy, which the most solemn marriage, upon the publication of banns, by the greatest divine of the Scottish Church established by law, could draw after it or confer. That is the law, and we are to administer it; we are only to consider in each case whether the facts bring the parties within the scope of that law? Now, marriage is a consensual contract; it is constituted by consent, and consent alone. But there are three various ways in which you have evidence of the consent. There are two kinds of consent as they may be called. One is consent in fact; the other is consent to be presumed by law. The former is either a direct consent *per verba de præsenti*—a consent mutually given and taken to be man and wife thereafter; or it is that which

March 3, 1831. is evinced by living as husband and wife, and acknowledging each other as such *rebus ipsis et factis*. The other way is that which touches the facts of the present case more immediately, where a promise is given, and a copula follows upon the promise, and is to be taken as not disconnected with that promise; and here the law, *presumptio juris et de jure*, implies consent. A promise, like all other acts, may be proved by two several ways,—either by direct evidence or circumstantial evidence. There may be direct evidence by the testimony of witnesses who heard the promise given. There may be direct evidence in writing, proved to be of the hand of the party giving it. But the promise, like all other facts, may be proved by circumstances. It may be proved, without either witnesses to support it, or the hand-writing to remain on record against the party promising. Circumstances may be proved by evidence—circumstances may be proved by the testimony of witnesses or by written evidence; and if those circumstances are sufficient to convince the Court, trying the question as a matter of fact, that a promise did take place, the promise must be taken to have been made, as much as if it had been established by the other more direct and immediate proof, nay sometimes circumstantial evidence is stronger, and less liable to doubt than direct evidence, inasmuch as it is more difficult to make out a circumstantial case by curiously contrived perjury, than a direct case by a witness, who may take a false oath to the fact. Now, let us see what the evidence is, being not of the direct but of the circumstantial kind, by which we here are called upon to believe, as the Court below did, a promise of marriage by the appellant.

I shall now, my Lords, take the case—sifted by the observations I have taken leave to throw out—as if I were at *Nisi Prius* trying it with a jury, and stating to them the grounds on which their verdict ought to turn. I should then inform them, that there were three matters for their consideration, before being satisfied of which they could not find a verdict for the affirmative of the issue. Stating the issue which had been joined—what is called in English law pleadings, an issue of *ne uncques accouple*,—I should call upon them to consider three particulars;—that they must be satisfied there was a promise, a serious promise, intended as such by the person making it, and accepted as such by the person to whom it was made; that, in the second place, they must be satisfied that there was a cohabitation afterwards; that, in the third place, they must be satisfied that there was no disconnection between the subsequent cohabitation and the preceding promise (that is the way in which I think I am most safe in stating it) that there is no disconnection—no *medium impedimentum*,—no evidence to rebut connection,—between the cohabitation

March 3, 1851.

and the promise. If that disconnexion is not substantiated, the law will take the promise to be connected with the copula. Now here the copula is admitted;—there is no doubt whatever of its having taken place. The disconnexion cannot be set up,—for the time is so short, the circumstances are so little varied, (that is, the circumstances of the parties between the promise and the copula,) the relations in which the parties stood to one another, and all mankind besides, are so precisely the same, that I take it to be quite as clear that there was no disconnexion of the copula with the promise, as it is clear that there was a copula. Then the only question turns on the existence of a promise, and to that I now come in the last place. If the doctrine had been ventilated here, that courtship or other circumstances showing an intention, nay that an intention to marry, however strongly expressed, and however plainly entertained, constituted what may be termed (borrowing an expression familiarly known to the Scotch lawyers) an equipollent to a promise, I should have taken leave to deny the proposition in point of law. The promise must be mutual—both parties must be bound; the marriage to bind one must bind both: there is nothing more plain than the perpetual distinction between an intention to marry and a promise to marry; and the law attaches on the promise followed by the copula, and not on any intention. But courtship is a most material fact in the case, when you are examining whether, from the conduct of the parties, it appears that a promise had actually passed between them. Where persons are on the footing of lovers, when it is well known that love is usually followed by matrimony, that it is naturally incident to the relation of lovers to wish to be married, and that a long course of courtship can hardly have any other object than marriage in view, though the intention to marry will not of itself supply the want of a promise, yet, in seeking for evidence of a promise, the long courtship and the intention make it extremely probable that the parties had received mutual promises of marriage. Therefore, if it stood alone as a mere question of probability, that would carry us a good way towards satisfying the jury (whom I suppose to be trying the cause) that there was a courtship, and a course of love-making, with a view, as it may generally be taken, to matrimony, otherwise it is no courtship between the parties. This however would plainly not be enough. But now, let us see whether the evidence rests here; because if it did I should have been for reversing the judgment. We cannot however quarrel with that judgment when we look at the evidence, for we find, first of all, the strongest expressions of that kind of attachment which springs up between lovers, who can have only a permanent, that is, a matrimonial connexion in view,—“Love me as I love you, and

March 3, 1831. "put my heart at rest by assuring me of it;" and this expression; — "Farewell, thou in whom all my joys are centered; my lovely Betsy, adieu!" — "I trust you will never be able to accuse me of having a bad heart. Believe me, I would not intentionally hurt any one, far less that being for whose happiness I would lay down my existence," — with other expressions I do not single out. Then, was this expression of attachment reciprocal; — was this tender of the heart in love with a view to a matrimonial connexion, though not promised? — I am not talking about promise, but courtship. — Was this accepted by the lady? An answer to that letter must, of course, though the appellant does not produce it, however he may have accounted for it, be more or less satisfactory. I rely not on that. He says, "I received your most welcome letter this morning, my ever dearest Eliza." Why was it most welcome? Could it be for any other reason than that she gave her reciprocal affection, and that she gave the offer of her love in return for his? Then he says, "Well does it deserve an immediate acknowledgment;" for what? Because it returned his affection: — "Never can I sufficiently thank you for the alacrity which you have displayed." Here is a second step taken towards the conclusion — there is love — the tender of the heart — a courtship to affirm a connexion; and that is proof, if any were wanted, under the third head of the observations which I am making. The second step is the acceptance by the lady of the heart or the love of this person. Now come we to the more material parts, for they leave no doubt on my mind of a promise having existed between the parties: "You will receive this on Monday, and write me soon. God bless you, thou dearest girl. Again farewell; and believe me, with an attachment strong as it is pure, yours most affectionately." That is pure, virtuous love; — that is courtship, with a view to virtue; — that is courtship, with a view to matrimony; and suffer me to add, that we are not merely to consider what may have been, — to speculate on what may have been, the intentions with which he wrote, but we are, according to the observation of Sir William Scott (Lord Stowell), in that admirable judgment on what may be called the leading case in the Scotch law of marriage, though delivered by him in an English suit — we are to consider first what the lover meant by those words, and then how they were likely to be received by the party they were addressed to; for, can any thing be more monstrously unjust than that a man shall use certain expressions, and then turn round and say, I meant not so, though the party to whom they were used could have affixed to them but one meaning? Following this remark, how does the correspondence proceed? — "Nothing, I trust, will thwart the happiness I look forward to." Now, I beg your Lordships to attend to this; — a promise differs from

March 3, 1831.

verba de præsentī in this, that it contemplates a future period — what I have read I mainly rely on, because it proves it was a contemplation of an after event—intentions however ardent, however strongly expressed—courtship, however direct—asking, however plain and prompt it were—and asking the hand in marriage—they all refer to the present; but what differs a promise from this thing is, that it has a future reference—it contemplates a future time. Now, your Lordships will observe, these expressions all sound in future: “Nothing, I trust, will thwart the happiness” I possess—I enjoy—I prize;—words of present meaning?—no such thing,—“the happiness I look forward to,” that is future,—“nothing shall—nothing can—for it is felicity sanctioned by virtue herself, and every thing that is tender and amiable.” Can any man read these words, and not affix this plain meaning to them, that she was to look forward; and he told her that he looked forward to nothing else but marrying her, and that virtue itself would sanction that pure affection and those pure enjoyments only in the state of matrimony, which alone he plainly contemplates. Can I wonder if the lady construed (according to Sir William Scott’s doctrine in *Dalrymple v. Dalrymple*) this as a direct promise? But though I don’t take it now as a direct promise in itself, yet it is the strongest evidence that they were on the footing of a party promising, and a party to whom a promise was made at this period, before the cohabitation had taken place. I don’t accede to what Lord Glenlee lays down, in a doubtful sort of judgment, that if the first part of this passage stood alone, it would have gone far; but he rejects it entirely for what follows—“Every thing that is tender and amiable”—he says that is nonsense, and is a violent, trashy expression. With great submission to that learned and excellent Judge, I don’t think that is so accurate and philosophical a view of the subject as his Lordship is wont to take in other inquiries. I do not think adding “tender and amiable” to the expression of “felicity, sanctioned by virtue herself,” will enable me to get rid of the plain and manifest tendency of the expression—“In offering you, my best beloved, “that heart which has for a long time been devoted to you,” (this is in the same letter in which he thanks her for accepting his love) “I have only to lament that it is not a more deserving gift to her “to whom it is offered. We will talk over the future when we “meet.” Could any one think this meant any thing but future marriage? What were they to talk over?—cohabitation, fornication? No; they were to talk of their pure affection, sanctioned by virtue itself. The future was the matrimonial future, and clearly could mean nothing else. Then we have again—“You “deprive me, thou who art the most dear of thy endearing sex, “of a very great pleasure, by prohibiting my delivering your letters

March 3, 1831. "to our uncle:" Then comes, "You have now no embraces for any one else, not even for aunt Fraser or sister Anne; I call them so, for your aunt is my aunt, and your sister my sister." Now, added to all that, I import from the subsequent letters into this consideration of the case the joy and the interest he takes when she appears to be with child, when he was looking forward to the birth of that infant,— "I must be with you to comfort and soothe you, and to partake of the joy such an event will excite." And he is anticipating the happiness, in another letter, of seeing all the schemes he had formed realized. Now, this is the expression of a person who looked forward to a matrimonial joy; and these expressions, as to the birth of a child, must mean, that he looked forward to that being his legitimate child, and not his bastard. Looking at all these letters, taking them all together, I can read them in no other way than as letters passing from one man to one woman, who had avowedly been in courtship—who had plainly been in courtship with a good view—and who had promised each other marriage, which there was an obvious and a satisfactory reason for deferring until a future period—I mean till the death of his father, who was then an old man, and who, very possibly, might view this as an unseemly, if not as an inferior or degrading connexion. My Lords, I beg to say, that I should differ with him, if he so regarded it. I desire to be understood as saying, that this lady's conduct stands as pure and unimpeached as that of any party who ever came to this Bar. I desire to have it understood as no part of my opinion, that my Lord Armadale's son, or Sir William Honyman's son, even if he had been a wealthy baronet instead of one in moderate circumstances, would have been at all degraded by forming a virtuous connexion in marriage with a lady who had been governess to his sisters—of whose accomplishments I have his own admission—whose charms he is the loudest to speak forth—and whose virtue,—whose purity of character, is entirely unimpeached by the evidence, the result of all the scrutiny to which it has been subjected.

But, if there was any doubt or ambiguity as to the meaning of the previous expressions, the copula which follows will carry us far out of the scope of that doubt; for I desire to be distinctly understood as acceding to the doctrine, that where persons are in courtship—though courtship is not a promise—and where ambiguous expressions may have been used, and where an offer of love may have been made on the one hand, and accepted on the other, that which is doubtful will become certain, and that, if there is great probability of a promise having taken place, that probability may be turned into a certainty by the copula which follows; and, for this plain and obvious reason, that the woman, in these circumstances,

March 3, 1831.

does not yield her virtue for nothing ;—I assume that she gets that consideration for it, precisely as I would assume, if I had a doubt about the evidence of a common contract for the purchase or sale of merchandise, when I saw one party paying the price—if there were an ambiguity as to whether the price was stipulated—I should consider that that ambiguity was removed by the fact of its being paid. In holding this doctrine—for which I know not that I have the warrant either of the dictum of any Judge, or the authority of any text-writer, or of one decided case on the law of Scotland, in this House—I know that I am following out the principles on which the Scotch law is founded—I know that I am laying down a rule which is of a wholesome and efficacious tendency in respect to the contract of marriage. These are the grounds, my Lords, and the reasons which I have gone into at more length than I should otherwise have deemed it necessary to do, in moving the affirmance of the judgment. I take leave to submit, that there is sufficient evidence to establish marriage in this case. I have laid purposely out of view the letter where the word “wife” has been mentioned—and I have laid it out of my view, because there is nothing on the face of the instrument which has been given to explain the erasure favourable to the party into whose custody it came from the party in whose power it had been. I therefore rest my opinion—which is to advise your Lordships to affirm this judgment—on the other facts of the case, which are sufficient, notwithstanding the two circumstances which I think were unfavourable, and which, I think, did cast a shadow of doubt over the question at different parts of the argument. I mean, in the first place, the letter, and the non-production of the evidence referred to in that letter, and which leaves in my mind some doubt whether this unhappy woman, reduced to the greatest difficulties, burthened with children whom the appellant seems to have had no very great inclination to support, and denied the rights of a wife to which she deemed herself entitled, did not, probably under the bad advice of some female friend, put forth a stronger case, by way of intimidation, than she really had. That unsuccessful attempt I will dismiss from my judgment, if I see evidence, independent of it, to satisfy me that she had a good case. I have not lived so long in Courts of justice not to have observed that a good case is often marred by trying to make it better through the contrivance of parties, or the zeal of their supporters. The other point which I would advert to, as having cast the case into a shade of doubt, is, that a good deal of correspondence took place, in which she asked for money in the most touching and painful manner, and alluded to the children and to the connexion that had subsisted between them; and yet, though the footing on which they

No. 13. MAGISTRATES of DUNDEE, Appellants. — *Lushington* —
Rutherford.

JOHN MACKENZIE LINDSAY, Respondent.—*Spankie*—*Robertson*.

Burgh Royal—Process—Appeal.—1. The town council of a royal burgh being empowered by the set, in the event of the person elected Dean of Guild by the guildry not producing evidence of his qualification to hold the office, to elect a Dean of Guild themselves; but having, in respect the party elected by a majority of the guildry was disqualified, found that another candidate supported by an apparent minority was duly elected, and that the votes for the other candidate, to whom no objection was stated at the meeting of guildry, were thrown away —Held (affirming the judgment of the Court of Session) that the Town Council had not exercised their powers under the set, and that the whole election was illegal, null and void.

2. After an appeal had been entered against a judgment reducing an election of Magistrates, and the parties (as was alleged) came to an understanding, for political reasons, to allow it to be heard *ex parte*, found competent for a burgess, although not a member of Council, to be sisted and heard as respondent, but that a candidate as Member of Parliament was not so entitled.

March 17, 1831.

2D DIVISION.
Ld. Moncreiff.

By the set of the royal burgh of Dundee, the election of the Dean of Guild and Councillor to the Guild, who are constituent members of the Town Council, is regulated as follows:—" On " the Wednesday immediately after the election of the provost " and other office-bearers, the Guildry Incorporation shall meet " at eleven o'clock in the forenoon, in the Guildhall, or such " other place in Dundee as a general meeting of the guildry " shall at any time fix, and, by the voice of a majority of the " members present, elect a guild-brother, being a burgess, " to be Dean of Guild for the year ensuing; and another guild- " brother, being also a burgess, to be Councillor to the Guild " also for the year ensuing. The Dean of Guild, and Councillor " to the Guild, shall attend the first stated meeting of council " after their election; and, before taking their seats in council, " shall produce their several burgess and guildry tickets, as " evidence of their being burgesses and guild-brothers, with an " extract of the minute of their election, certified by the clerk of " the guildry." A similar course of proceeding is prescribed for the convener and deacon of trades; and, with reference to this matter, the set declares, that " in case the Dean of Guild and " Councillor to the Guild, and convener, or any of them, shall " fail to appear in council on the day appointed for their taking " their seats—or appearing, fail to produce the requisite evi-

“ dence of their several elections and qualifications,—or if it March 17, 1831.
 “ shall appear, from the evidence produced, that the guildry
 “ and trades, or either of these bodies, have made a double
 “ election, then and in any of these cases the right of sup-
 “ plying the deficiency which shall have thus arisen in the
 “ Council shall, for that year, devolve on the Magistrates and
 “ Council, who shall immediately elect a Dean of Guild and
 “ Councillor to the Guild, or either of them, in place of the
 “ Dean of Guild and Councillor to the Guild who have so
 “ failed to take their seats as elected by the guildry, and a
 “ Trades Councillor in place of the Convener who has so failed
 “ to take his seat as elected by the trades; without prejudice,
 “ however, to the guildry and nine incorporated trades exer-
 “ cising their respective rights to elect those members of
 “ Council in future years.”

Alexander Kay and William Lindsay, were put in nomination for the office of Dean of Guild at the meeting of guildry held on the 3d of October 1827 for the purpose of election. No objection was stated to Kay, as not being duly qualified to be elected; and on the roll being called there appeared for him 141 votes, and for Lindsay 128. A scrutiny of the votes was commenced, but abandoned; Kay was thereupon declared by the presiding Dean to be duly elected—was called in—took the chair—and presided at the election of the Guild Councillor; but a protest was taken for Lindsay, that he was the duly elected Dean. On the 8th October, at the first meeting of Council held thereafter, Kay appeared, presented an extract of the minutes of election, and claimed to be received as Dean of Guild for the ensuing year. To this it was objected, *inter alia*, that he was not qualified, as being a burgess only for his lifetime, and not for his heirs and successors,—which last description of burgess-ship was said to be necessary to qualify a party for office; and the Provost moved, “ That the Council do find
 “ and declare that the said Alexander Kay has not produced
 “ the requisite evidence of his qualification for the office in
 “ terms of the sett of the burgh, and therefore cannot be
 “ received by the Council as Dean of Guild;” and this motion was seconded by Mr. Anderson.

Calman, Old Bailie and Councillor, moved, as an amendment
 “ That the Council do find and declare that the said Alexander
 “ Kay has produced the requisite evidence of his qualification

March 17, 1831. “ for the office in terms of the sett of the burgh ;” and this motion was seconded by Convener Gardener.

The question having been put, and the vote called, all the members present voted against the amendment, and in support of the Provost’s motion, except Calman and Gardener, who voted in support of the amendment, and against the Provost’s motion; but two Merchant Councillors had left the meeting before the roll was called; and accordingly the Council, Calman and Gardener dissentient, found and declared in terms of the Provost’s motion.

Thereafter the Council, by a majority, found and declared, “ That, in respect the Council have determined, and hereby “ determine and declare, that the said Alexander Kay is not “ legally qualified to hold the office of Dean of Guild, it is un- “ necessary to enter on any inquiry of the other objections.”

After the Council had thus rejected Kay, Lindsay appeared, and, producing the minutes of the guildry meeting, claimed a seat in Council as Dean of Guild duly elected, as set forth in the said minute.

Against Lindsay’s claim two objections were made: “ 1. That “ he had not been elected to the office of Dean of Guild by the “ guildry. 2. That, on the contrary, he had a minority of votes ; “ but, independently of this, many of his voters were disqua- “ lified because they were members of one or more of the nine “ incorporated trades of Dundee, and did not produce evidence “ that they had renounced their political privileges as such.”

Thereon the Provost moved, “ That the Council, having con- “ sidered the claim of the said William Lindsay, the said extract- “ minutes of the meeting of the guildry, and the evidence pro- “ duced by the said William Lindsay of his being a burgess and “ guild-brother, and the whole proceedings above recorded, and “ also specially the objections stated by the said Alexander Kay “ above mentioned,—find, that the said William Lindsay has “ produced sufficient evidence of his being a burgess and guild- “ brother : find, that it appears from the said extract-minutes of “ the meeting of the guildry that the said William Lindsay “ and the said Alexander Kay were the only persons put in “ nomination for the office of Dean of Guild, and that there “ were votes which have not been objected to for each of them : “ find also, that the Council have already determined that the said “ Alexander Kay is not legally qualified to hold the office of

“ Dean of Guild : find therefore, that the votes given for the said March 17, 1891.
 “ Alexander Kay are not to be regarded : find likewise, that
 “ as there were unchallenged votes in favour of the said
 “ William Lindsay, and no other person in nomination legally
 “ qualified to hold the office, it is not necessary to inquire
 “ whether the particular votes mentioned in the objections were
 “ legal votes or not; and therefore that the said William Lindsay,
 “ the only qualified candidate, has been legally elected by the
 “ guildry to be Dean of Guild for the ensuing year.” Calman
 moved, as an amendment, “ That the said William Lindsay
 “ was not legally elected to be Dean of Guild, in respect it
 “ appears from the extract-minutes produced that it was not
 “ Mr. Lindsay, but Mr. Kay, who had the majority of votes at
 “ the said meeting, and that therefore the Council cannot receive
 “ Mr. Lindsay as a member of Council ;” and the vote having
 been called, all the members present voted against the amend-
 ment, and in support of the Provost’s motion, except Calman
 and Gardener, who voted for the amendment, and accordingly
 the Council found in terms of the Provost’s motion.

Thereafter Lindsay was admitted and received by the Council
 as Dean of Guild for the ensuing year, and he accepted of his
 office, promised to be faithful, and took his seat in Council.

At the same time John Morton (whose burgess ticket was
 alleged to be precisely similar to that of Kay) was admitted as
 Guild Councillor.

Kay and Morton then presented a petition and complaint, the
 fee-fund dues of which were paid on the 7th December. and it
 was marked as boxed and lodged on the 8th. They prayed the
 Court to find that “ the whole of the said annual election or pre-
 “ tended election is illegal, contrary to the sett, laws, and con-
 “ stitution of the said burgh, and the laws of the land, and ab-
 “ solutely null and void, and to reduce and set aside the same
 “ accordingly ; or at least to find that the said pretended election
 “ of the said William Lindsay as Dean of Guild is illegal, contrary
 “ to the sett, laws, and constitution of the burgh, and the laws
 “ of the land, and absolutely null and void, and to reduce and set
 “ aside the same accordingly ; and to find and declare that the
 “ complainer, Alexander Kay, was legally elected to the said
 “ office, and has the only legal and undoubted right and title to
 “ the same, and ought to have been received and admitted by
 “ the Town Council into their body as Dean of Guild accord-
 “ ingly ; and to ordain the persons complained upon still to

March 17, 1831. “ admit and receive him as such ; and, finally, to find the persons
“ complained upon liable to the complainers in expenses.”

This they maintained on these grounds :—“ 1, The complainer,
“ Alexander Kay, was duly elected Dean of Guild by the
“ guildry, and is now the only legal Dean, and as such ought
“ to have been received by the Magistrates and Town Council,
“ the objection taken against his qualification, that he was not a
“ burgess, being groundless and totally unsupported by the sett,
“ and contrary to the usage of the burgh.

“ 2. Supposing the complainer not to have been duly elected
“ by the guildry, or to have forfeited the office conferred upon
“ him by that election, in consequence of the disqualification
“ alleged against him, there was no legal election of Dean of
“ Guild at all ; for no notice having been given to the electors at
“ the meeting for election, of the said pretended disqualification
“ as existing against the complainer, there was no legal ground
“ for holding the votes of the majority of the meeting as thrown
“ away ; and there being a majority of votes against Mr. William
“ Lindsay, that gentleman was of course not elected Dean of
“ Guild by the guildry ; therefore the decision of the Council
“ that he was so elected, with their consequent admission of him
“ as a member of Council, was contrary both to fact and law.

“ 3. If the complainer, who was the only person elected Dean
“ of Guild by the guildry, did not produce to the Council suf-
“ ficient evidence of his qualifications to hold that office, or
“ otherwise forfeited his right to be received by the Council,
“ then, Mr. Lindsay not having been elected by the guildry,
“ the only course allowed by the sett for filling up the office was,
“ that the Council should themselves, *jure devoluto*, have elected
“ a Dean of Guild by an independent act of election of their
“ own ; and this not having been done, the necessary conse-
“ quence would be, that no Dean of Guild has been legally
“ elected at all.

“ 4. Supposing the objection taken against the qualification
“ of the complainer, Mr. Kay, to be well founded, the complainer,
“ Mr Morton, whose qualification is liable to similar objection,
“ has not been legally elected Councillor to the Guild, and the
“ full and necessary number of the Council has not been filled up.

“ 5. If the election, either of the Dean of Guild or Coun-
“ cillor to the Guild, was contrary to law, the consequence
“ must be, that the whole election of Magistrates and Council-
“ lers becomes null and falls to the ground.”

Against the competency of this petition it was objected, that March 17, 1831. as the election of the Dean took place on the 3d October, and the petition had not been lodged till the 8th December, the statutory period of two months had elapsed; but the Court (31st May 1828), holding the admission of the Dean on the 8th October to be the last step of the election, found the complaint competent.*

While this discussion was going on, the Council, at the election of 1828, cited Kay to attend and act as Dean of Guild; and on his failure they elected to the office, as in virtue of their *jus devolutum*, Jobson, who acted as Dean in the several parts of the election. In the meantime, the cause having been remitted to the Lord Ordinary for preparation, condescendences and answers were given in and revised. The parties differed widely on the facts necessary to determine the objections to the qualifications of the two candidates and the validity of the votes at the guildry meeting; but, at the request of the parties, the Lord Ordinary reported the cause, without however closing the record, lest it might be necessary to remit to the Jury Court. His Lordship added the subjoined note.†

* 6 Shaw and Dunlop, No. 322.

† The Lord Ordinary reports this case at the desire of both the parties. The complaint contains alternative conclusions; either, 1. To have it found that the whole election of the Magistrates and Council at Michaelmas 1827 was null and void, in respect that there was no legal election of the Dean of Guild completed in terms of the set; or, 2. To have it found that William Lindsay, the person received by the Council as Dean of Guild, was not duly elected; and that the complainer, Alexander Kay, was duly elected, and ought to have been admitted by the Council. The merits of the case depend partly on matters of fact, in which the averments of the parties are opposite, and partly on questions of law; and in some points the law and the fact are very much mixed together. 1. The first plea in law for the complainer, and the first part of the first counter plea for the respondents, depend on the facts regarding Mr. Kay's situation as a burgher and as a guild-brother, on the construction of the set, on the usage of the burgh in regard to the admission of burghers and guild-brethren, and on the validity of the votes given at the election meeting. Though there may be a good deal of law involved in this part of the case, it would probably appear to be fit for trial in the Jury Court if not superseded by other points. 2. The second plea in law for the complainer is, that, supposing him not to have been qualified to be elected, it was incompetent for the Council to declare his competitor duly elected, in respect that no notice of the objection to his qualification was given at the election meeting, whereby the votes given for him were not thrown away; and the third plea on the same supposition is, that the Council could only make an independent election of a qualified person by their own powers, *jure devoluto*, and that by the course which they have followed no Dean was elected. These pleas seem to depend on questions of pure law, assuming the facts as against the complainer; and they are met by the second part of the respondent's first plea. 3. The last or fifth

March 17, 1831.

After a hearing in presence, the Court, on the 9th March 1830, pronounced this interlocutor :—“ In respect that the election of Alexander Kay as Dean of Guild of the burgh of Dundee, for the year ending the 8th of October 1827, was not duly completed and declared by the Council in terms of the set of the burgh, and that William Lindsay was not duly elected Dean of Guild in terms of the set, and that the number of the council, at the close of the annual election complained of was thereby incomplete, therefore find the whole election of Magistrates and Council of the burgh of Dundee for the said year illegal, null, and void ; and decern and declare accordingly.”*

On the 11th, the Court appointed interim Managers†; and against these judgments the Magistrates, on the 23d, entered an Appeal, but they allowed it to fall by not lodging their case in due time. They then, on the 24th of June, presented a petition to the King in Council, setting forth that the burgh had been disfranchised, and praying for a royal warrant containing a new set of political constitution for the burgh. A dissolution of Parliament being expected, two candidates announced themselves, the Hon. Donald Ogilvie and the Hon. J. S. Wortley, for the representation of the district of Burghs of which Dundee formed a-part, and in consequence a

plea in law for the complainer, that if no Dean of Guild was lawfully chosen there was no legal election, would, if his second and third pleas were also sustained, support the first conclusion of the complaint. 4. The fourth plea in law for the complainer relates to the alleged disqualification of Mr. Lindsay, the person declared to be duly elected ; and this involves a case of fact, construction, and usage which would probably require trial ; but, 5. The respondents, in a third branch of their first plea in law, maintain, that even though they erred in judgment the proceeding was judicial, and, though subject to review, would not infer a nullity in the whole election. This is a point of law which, if sustained, would, on the supposition made, introduce the second alternative conclusion of the complaint ; but it probably would not be decided unless the facts were either admitted or ascertained by trial. 6. But the respondents, in their second plea in law, further maintain, that, supposing neither Mr Kay nor Mr. Lindsay to have been legally elected in 1827, a Dean of Guild was lawfully elected by the Council, in virtue of their own powers, in 1828. This involves a question of law as to the effect of the proceeding referred to, to prevent the consequences of any error in the election of 1827. In this state of the case it has been thought proper to report the cause, rather than at once to send it to the Jury Court ; and as it has been found inconvenient in other cases to have a shut record where a remit to Jury trial may take place, the record, though fully made up and revised, has not been closed.

* 8 Shaw and Dunlop, No. 338.

† Ibid. No. 348.

meeting of the managers was held on the 13th of July, when, March 17, 1831. after expressing their regret that the burgh had from disfranchisement no vote, they recommended the other burghs to support Mr. Wortley. A general election having taken place, and the contest between these two gentlemen being equal, a delegate was appointed for Dundee, and in consequence Mr. Wortley was returned. Against this Mr. Ogilvie petitioned; and a Committee of the House of Commons being appointed, the Magistrates, on the 10th of November, presented a new petition of appeal, and on the 7th of December the committee resolved that the election was void. A new writ was in consequence issued, when a contest took place between the Hon. William Ogilvie and the Right Hon. Francis Jeffrey, who had just been appointed His Majesty's Advocate for Scotland. A delegate was again sent by Dundee, and the Lord Advocate having thereby a majority obtained the return. Against this Mr. Ogilvie presented a petition to the House of Commons; and the Magistrates, having (as was alleged) come to an understanding with Kay and Morton, the original respondents, applied to the House of Lords to have the cause heard on an early day, and ex parte, in respect that Kay and Morton had lodged no case. Mr. Ogilvie and John Mackenzie Lindsay, a burgess and guild brother, but not a member of council, thereupon presented petitions to the House of Lords, the former stating the position in which he stood as a candidate for the representation of the burghs. but not alleging that he was a burgess of Dundee, while the latter stated that he was a burgess and guild brother, and praying that they should be permitted to appear as respondents, and be heard against the appeal. The Committee on Appeals reported, that
“ they were of opinion, under the circumstances of the case, that
“ the said petitioner, John Mackenzie Lindsay, might be allowed
“ to appear as a party respondent to the said appeal, and be heard
“ by his counsel against the same, but with a saving of all ob-
“ jections* which may be made on the hearing of the appeal to
“ the competency of his being so let in as a respondent,” and
that they were “ of opinion that the prayer of the petition of the
“ said William Ogilvie ought not to be complied with.”

* On opening the case, the appellants waived all objections to John M. Lindsay being let in as a respondent.

March 17, 1831.

Appellants.—1. By the statute 7 Geo. II. c. 16. § 7. it is enacted, that it shall be competent to complain of any wrong “done at any annual election” “only within the space of eight weeks after such election is over;” and by the 16 Geo. II. c. 11. § 24. the period is declared to be “two calendar months after the annual election of the Magistrates and Councillors.” In Dundee the election commenced on the 2d of October 1827, by choosing nineteen members of the Town Council, and on the 3d it was concluded by the Dean of Guild and a Councillor being on that day elected so as to make up the complete number of the Town Council; the election therefore terminated on that day; and although it is true that a subsequent meeting was held on the 8th to receive the Dean of Guild and Councillor, yet this was not an act of election, but a judicial proceeding; but as the petition and complaint were not lodged till the 8th of December, and the statutory period had expired on the 3d, it was incompetent, and consequently the judgments complained of unwarranted.

2. The original complainer, Kay, was not qualified to hold the office of Dean of Guild, and those who voted for him threw away their votes. It was not necessary to state any objection to his qualification; the electors were bound to know whether he was qualified or not before giving their votes. Although this matter goes to the foundation of the case, and the appellants offered proof that Kay was not qualified, the Court below did not allow such evidence to be taken.

Independent of this, his competitor Lindsay had the majority of legal votes. On this point also the appellants were always ready to join issue; and as the leaning of the court ought to be against disfranchisement, they ought to have been permitted to have had this matter investigated.

At all events, as both Kay and Lindsay were cited to appear at the election of 1828, and they failed to attend, the appellants were entitled, in virtue of their *jus devolutum*, to make choice of a Dean of Guild; and as that election was not complained of, and was regular, the burgh ought not to have been disfranchised.

Respondent (Lindsay).—1. The proceedings on the 2d and 3d of October were merely preliminary or initiatory steps towards the election of the Magistrates and Council, and that election was not complete till the 8th of October. The evil complained

of is the act which was done on that occasion, and consequently there were no grounds of complaint till it occurred. Besides being the last of a continuous act of election, the statutory period must be counted from that date, and not from any of the intermediate ones. March 17, 1831

2. No objection was stated to Kay as a qualified person at the time of the election; and it is not denied that he was, at least to certain effects, a burgess and member of the guild. By allowing him to be put in nomination without objection one of two consequences follow, either that all objection was waived, or that no valid election has taken place. In either case the complaint is well founded. Although a scrutiny was competent on the occasion of the election by the guild, yet so soon as the election was over it was incompetent, and cannot now be entered upon. Besides, a scrutiny was begun, but abandoned, and Kay regularly installed into his office.

If the election of 1827 was illegal, then no subsequent election could, without the intervention of a royal warrant, be valid; and, besides, the general rule of law is, *pendente lite nihil innovandum est*.

LORD CHANCELLOR.—My Lords, when this case was opening, I entertained, for a considerable time, some doubt upon one point, as my noble and learned friend did on another. I have since, and I believe my noble and learned friend concurs in that opinion, satisfied myself that those doubts, grounded on the words of the act of parliament, and the terms of the 6th article of the sett, with the proceedings thereupon, were not well founded, and that the Court below has come to a right decision on that point as well as on the other. Two questions are brought into discussion by this appeal. One is the question of limitation. Whether or not the statutory period of two months had elapsed before the petition and complaint (which summary mode of proceeding gave rise to the present appeal) was presented? The other, whether or not, admitting the petition and complaint to have been duly prosecuted, and within the statutory time, the Court came to a sound conclusion on the merits of the case? The first of these questions, if decided in favour of this appeal, would render the other wholly immaterial. The second question only becomes material in the event of the first being given against the appellants.

According to the view I take of this case, the second question becomes material, and is raised before your Lordships. The first question depends on another, namely, what shall be taken to be the

March 17, 1891. terminus a quo,—the date from which the two months' statutory period of limitation shall run? If it is to be taken from the election by the guildry of Mr. Kay, then the petition and complaint was out of time; if, on the other hand, it should be taken to run from the 8th of October, the day when the extraordinary proceeding, that appears to have given rise to this complaint in the council, occurred, then it is in time, being just within two months. Every thing depends, therefore, on whether you shall take it to be from the 3d or from the 8th of October. The 3d of October was the election of dean of guild. Mr. Kay was elected by a majority of thirteen voices over Mr. Lindsay; and after that election, namely, on the 8th of October, the meeting of the council was holden, at which several things are required to be done by the sett of the borough; and as every thing depends on what those things are, it is necessary that I should at present call your Lordships' attention to them. According to the fourth article of sett, the dean of guildry and councillor to the guild—that is to say, the person who *primâ facie* has been elected dean of guild—"shall attend the first stated meeting of council after their election, and, before taking their seats in council, shall produce their several burgess and guildry tickets, as evidence of their being burgesses and guild-brothers, with an extract of the minute of their election, certified by the clerk of the guildry." At the previous election it is only required that the person to be elected a dean of guild shall be a burgess, the guildry shall elect a guild-brother, being a burgess, to be dean of the guild for the next ensuing year. Consequently there is no production of the title, no production of the qualification of the candidate for the office of dean of guild, required by the fourth article of the sett. Then the sixth article requires, that after the election shall have been gone through, as provided for in the fourth, at the meeting of the council next after that election there shall be production of the burgess and guildry tickets, as evidence of the party producing them being burgesses and guild-brothers. . . . Together with what? With an extract of the minute of their election. Now, I take it to be quite clear that, in fairness of construction, according to the rules which are to be applied to all instruments, be they wills, deeds, acts of parliament, or setts of boroughs, this sixth article lays down what may be said to be the induction or institution of a person as a councillor of the borough; that he is a councillor if he is a dean of guild, by previous election—but that in order to be a councillor, at least to take his place as a councillor, he must produce a burgess and guildry ticket as evidence of his being a burgess and guild-brother. Can I then say that the whole constitution of his title as a councillor has been completed; or is more than inchoate, when he has only gone through the stage of being elected dean of guild under the fourth article—

March 17, 1831.

the sixth article plainly requiring him to take his seat on doing more than being elected—on doing more than even producing an extract of the minute of his election—on producing his qualification—his burgess and guildry ticket? If all that was wanted was his being elected, the producing an extract of the minute of his election would be enough, because he was elected, and his election was not disputed; but it requires him to go further, and to produce the evidence of being a burgess and guild-brother, by producing the burgess and guildry ticket, which production is never once hinted at in section fourth of the sett, the one that regulates the mode of proceeding at the guildry for the election. Now, this goes far to throw light on what constitutes the complete election, and to get rid of what at first had struck me, namely, the difference between the election and taking seat; because the expressions are, “the first meeting after the election,” which should seem to imply the election was over at that time; “and before taking their seats,” not before being elected councillors, “shall produce a minute of their election,” intimating the election was over, “certified by the clerk;” and the sett further says, if any persons shall fail to appear, or, appearing, fail to produce the requisite evidence of their several elections and qualifications, or “there shall have been made” (in the past tense) “a double election,” thus indicating that the election was one stage, as it at first appeared, and the taking the seat another thing, done subsequent to and independent of the election, and not constituting any part of the election; but when you take into consideration the matters which I have just now referred to in respect of the induction, as it were, of the councillors, the difficulty which arose on what I have last referred to appears to be got rid of. Now come we to the act itself. The first act is less material, both because in point of time antecedent to the other, and because the other is more explanatory and more precise. It says, that “whoever apprehends wrong done at any annual election is to bring his action before the Court;” that is, his action, and not his summary petition, for making void; “they are to hear it summarily; but it is an action for making void the whole election (if illegal) only within the space of eight weeks after such election is over.” From this it might be contended, that you are to run the date eight weeks from the period of election of which you complain; but the 18th of Geo. II. cap. 11. sec. 24. appears to me to leave really no doubt on the soundness of the construction; for that says, “to apply to the said Court of Session by a summary proceeding (which this proceeding is) to rectify such abuse, or for making void the whole election made by the majority, or for declaring and ascertaining the election made by the majority, so as such complaint be presented to the said Court of Session within two calendar months after the annual election of the

March 17, 1831. magistrates and councillors." It seems to me to make the whole proceeding one election from the beginning to the end, (all the steps taken together,) and to make the two months run from the determination of those steps, from the last of the steps which completes that called in this part not "election," or "such election," or "election complained of," but "the annual election," as a thing known in the law,—“the annual election of the magistrates and town councillors.” I am therefore of opinion with the Court below, that, in this case, that must be taken as the period from which the two months are to run; and then, my Lords, how greatly is that construction aided by the consideration, that if you do not give it this meaning, you really do no common fairness towards the act of parliament. You are always to lean towards that construction which makes an instrument consistent with itself or its principle; and in this case the construction contended for on the appellants' part gives rise to one of the greatest absurdities we can well imagine. This is a summary complaint and summary remedy,—it is *festinum remedium*; and it is to receive, being beneficial, a large and liberal interpretation. You will exclude the benefit of that summary remedy altogether, as to every act or wrong meant to be complained of, if the party does not apply within two months from a time when, for aught that appears, he had no ground of complaint whatever. The two months, within which his application for the remedy is to be confined, would run from one period,—not the period of the wrong complained of, for which the redress is meant to be given, but from another period when, perhaps, he had no complaint to make,—as, for example, in this very case of Mr. Kay (for it illustrates the argument very remarkably), he had no complaint on the 3d of October; he was then elected by a majority of thirteen; his complaint first began on the 8th of October, not at the time of his being elected, which he had no objection to, but at the time of the council refusing the vote of the guildry, and saying, “Although you have a majority of thirteen, yet you are not elected, because you are not a burgess, a guild brother; but Mr. Lindsay, who had the minority of thirteen, ought to have been elected; and we elect him, although no notice was given of the flaw in your title.” If this did take place within a week, no doubt that left Kay time to apply; but the next meeting of the council might have been three months afterwards, and then is he to be told, Because you did not apply when you had nothing to complain of, therefore you are too late? I think, my Lords, it would be an absurd and a monstrous conclusion to suppose the legislature meant to exclude a very possible case, namely, that of the time having elapsed within which the complaint must be taken advantage of, before any one thing occurred of which the party could have a right to complain. Upon this ground I think

the Court has well decided; and therefore the question of the merits is raised before your Lordships. March 17, 1831.

I am also of opinion that the Court below was right on this question. The thing complained of,—brought before the Court of Session,—decided on by the Court,—and brought before us by appeal,—is the thing which formed the subject of the petition and complaint; consequently, what is before us to decide on appeal is and can be none other than that which took place on the 8th of October,—the decision of council setting aside Kay's election, which I do not complain of, and putting Lindsay in his place, which I do complain of. Now, what was the Court of Session to do with this point? Were they to maintain,—“ True it is, Lindsay, having the minority, “ beat Kay, who had the majority; because Lindsay had a qualification which was never brought in question, and Kay had no “ qualification—which objection was not taken at the time;—but “ then, if you had done something else, and had chosen either to “ scrutinize the majority of Kay,—in which case you might have “ found Lindsay had the majority,—or had taken advantage of your “ *jus devolutum*, and elected him yourselves, he would have been “ duly elected, and therefore, *quacunque via data*, Lindsay is to be “ sustained as duly elected; and although you, the council, came “ to that conclusion in a wrong and absurd and inconsistent manner, “ yet as you have come, on the whole, to a right conclusion, we will “ not listen to this petition and complaint.” That is the argument; but it is wrong, fundamentally wrong, because the question was, whether or not the council had done right in rejecting Kay, who had the majority of thirteen; and not only rejecting him for want of qualification, but putting Lindsay in his place, who had the minority,—there having been no notice given at the election to make the votes thrown away which were given for Kay? That is what was before the Court of Session; but the scrutiny was not before the Court. The Court had no right to say, “ If you had scrutinized, you would have found Lindsay had “ the majority;” for non constat he would be found to have the majority. But then is it meant to be said, “ the Court ought to “ have sent the matter back to the council, and let them go into “ the scrutiny?” My Lords, it has been clearly and demonstratively shewn to you that they could not have sent it back, because the council cannot scrutinize. You might as well send back to the crown office to scrutinize the return of a knight of the shire. The scrutiny ought to be, and can only be, in the guildry, which is the elective body, and before whom Lindsay ought to have taken his objections to Kay's majority; and if he had chosen then to object, and to demand a scrutiny, they were bound to have given it him, and they were the persons to have expedited the proceeding; but

March 17, 1831. we have no evidence whatever, and the principle is all against it, that the council had the organs,—the instruments or powers necessary for entertaining the question of scrutiny, or conducting it in any way whatever. Then, my Lords, it might be said, and at first that struck me with some force; “You ought to lean against disfranchisement;—you saw you were about to do a thing exceedingly to be avoided—to disfranchise the borough; you ought to have sent it back to elect Kay, because he had the majority of votes, and Lindsay ought not to be put in his place.” But the answer is, that Kay, although he had the majority of votes, had not complied with the requisite of producing his guildry and burgess ticket. There the council were quite right; by the sixth article of the sett, unless he produces the guildry and burgess ticket, he shall not be a councillor; and he was not elected a dean of guild any more than a councillor, because the sixth article, although it in no way shews that the burgess ticket or the qualification is to be produced at the election, clearly shews that he must be a burgess at the time of the election; for it says, a burgess (a guild-brother being a burgess) to be dean of guild; consequently, I do not see how it was possible for the Court of Session to have remitted to the council to elect Mr. Kay in the room of Mr. Lindsay, whom they displaced. But it must also be observed, that the council is over,—the elections are at an end. The nature of the election is annual by the act of parliament, by the sett of the borough, and by the common law of the land in Scotland; and you could not have sent back, and have them to do any thing, either to scrutinize or to place Kay on the poll, as it were; because there was an end of those parties as a council,—there was an end of their whole election. The whole election is to be conducted once a year, at a particular time; and we all know that in England the common law said, however inconvenient, however hard, it may prove, still if the day has passed over, no mandamus shall lie to remedy that difficulty, though there should be a disfranchisement of the corporation; so that a statute had to be passed, for applying the remedy, by mandamus.

Then last of all shall it be said that *jus devolutum* occurred? My answer is, if it had occurred, and if Lindsay had been elected by the council in virtue of any *jus devolutum*, that would have been a complete answer to the petition and complaint, as far as the disfranchisement of the borough goes. It would then have been a complete election by the *jus devolutum*; but I deny that it occurred here. The *jus devolutum* occurs under the sixth article of the sett (which is the governing part of the charter here), either if they shall fail to appear on the day appointed, or, appearing, shall fail to produce the requisite evidence of their several elections, and of their qualifications. They did produce the evidence of the election,

and one of them produced the evidence of the qualification, although March 17, 1831. needless, for it does not appear that the same party who was elected produced his qualification. The truth is, that the council thought the person who had been duly elected was Lindsay, with a qualification; but they thought that the person who had produced no qualification, and yet was elected apparently, was not duly elected. But they never went on with the proceedings, on the supposition that no man had appeared, or, appearing, had failed to produce, both election and qualification; on the contrary, their interlocutor affirms that Lindsay was elected, and that he was qualified, and consequently they themselves exclude their *jus devolutum*; they do not elect on the principle of *jus devolutum*, as the *jus devolutum* gave them a right to elect; but they do not elect,—they say, “The guildry elected you. The guildry tried to elect Kay, but they could not; and we set aside Kay and elected Lindsay, who had a minority, in an error. We do not proceed to elect, ourselves, by virtue of the *jus devolutum* devolved on us.” I am inclined to think they might, if they had chosen to say, “The *jus devolutum* comes to us, and by virtue of that we elect Lindsay;” but they did not do so, and that is enough for the purpose of the argument. The law means to invest the council, in one of certain events, with the right of election; but they must elect, in order to comply with that part of the sett. They did not elect; but they say, “Lindsay was elected by the guild,” which he was not.

Upon these grounds, my Lords, I have a clear opinion respecting this case. I think I have listened attentively to the argument; I am sure I have listened impartially. It is said to be a political question. I know of no politics in this place. But partiality, as between the conflicting interests, I can have none. Towards one party, supposed to be interested in the question, I stood in the relation of counsel to a client; towards the other party I stand in the relation of a very old friend. Thus situated, if I had felt any doubt upon the subject, I should have declined troubling your Lordships, as not a safe adviser; or, at all events, should have declined giving my opinion until I had had the opportunity of further consultation on the question. But as I entertain no doubt whatever on any of the points, I feel myself bound to give your Lordships the best of my advice; and I have no hesitation in moving that the interlocutor be affirmed.

LORD WYNFORD.—After the very elaborate judgment which has just been pronounced, it is hardly necessary for me, my Lords, to add any thing. The only one doubt that I ever entertained on this case was, whether the Court of Session ought not to have directed an inquiry as to whether Mr. Lindsay had the majority of legal

March 17, 1891. votes; but I am now satisfied that Mr. Lindsay lost the opportunity of having that inquired into. If he wished for inquiry, it should have been by scrutiny before the electors. A scrutiny was begun by him, but was abandoned; and the two questions that are raised in this case are on the limitation of time, and on the merits. As to the limitation of time, the words of the act of parliament are, that the proceedings shall be had within two months after the election. When was the election terminated? Not until it was ascertained who was to fill the office. This cannot be known until it be determined who has the votes of the majority of the electors, and whether the person who has this majority is duly qualified to fill the office. If he be not so qualified, the election by the voters goes for nothing. When was the election in this case complete? Mr. Kay was elected, but Mr. Kay was afterwards found not to possess that which was requisite to make a complete election — the qualification to serve the office. Mr. Lindsay was not thought to be elected until the meeting of the 8th of October. That is the only possible day from which to date with reference to the election of Mr. Lindsay, for until this 8th of October it was supposed that Mr. Kay was the person elected, and not Mr. Lindsay. Would it not be absurd to say, therefore, that the time should begin to run, with regard to the election of Mr. Lindsay, from a period when Mr. Lindsay was not supposed to be the person elected? I therefore agree with the Court below, that we are to consider the election as ended when the last act is done which is essential to ascertain who is the successful candidate. This is very distinguishable from cases of the elections of members of parliament. The election of a member of parliament is completed in England from the moment the return is made by the returning officer. Here it appears to me, looking at the setts, that the election is not completed until the party elected has proved his qualification. The votes of the electors are to be ascertained by the guildry, but the election is not completed until you know whether the party who has the majority of votes has the qualification to serve the office: that is not to be done by the guildry. The words of the sett require that the candidate should prove his election and his qualification. Until that qualification is proved, I think, in the language of common sense, the election (under these setts regulating the rights of the corporation) is not completed. That being so, it appears to me that the Court below was perfectly right in saying that the petition was lodged in due time; and then upon the merits I do not think there can be the least doubt, because it is quite clear in this case, that unless the argument which was urged in the Court below could have prevailed, (which cannot, consistently with the election law of Scotland and of England,) that where a party is disqualified, that the other party,

although in the minority, although no notice is given, can claim to be returned, there is no pretence for considering Mr. Lindsay as duly elected. Mr. Lindsay was in the minority; and probably if the other electors of the borough had known that the person who had most votes was not a person qualified to serve, another candidate would have been put up, and Mr. Lindsay would not have been elected. That is the principle on which it has been decided, that unless notice be given of the disqualification of a candidate, the person having the minority of votes shall never be considered as duly elected, but the election shall be annulled. It is not necessary to say whether the question of the right of devolution had arisen or not, because that which was done was an act completing the election of Lindsay on that day. That act is appealed against, and I think that it has been disposed of properly by the Court below. It has been said the effect of this will be to disfranchise the corporation. We have been in the habit in Westminster Hall of moaning over corporations as if they were individual persons. There is, however, between a corporation and an individual this distinction, that a corporation may be revived again by the ordinary authority of the sovereign, whereas an individual person, if his dissolution has taken place, cannot be restored to life but by a miracle. I do not apprehend that any great injury will follow from this corporation being disfranchised, because his Majesty can call it back into existence again, either with the same powers, or, if he chooses to amend the corporation, by giving it such a new amended form as his Majesty in his wisdom shall think proper. My Lords, for these reasons I concur with my noble and learned friend in giving my vote for the confirmation of the judgment which has been pronounced in the Court below.

March 17, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities. — Henderson, July 3, 1821; 1 Shaw & Dun. No. 125.; Glass, Feb. 28, 1754 (1875); Pratt, June 9, 1824; 3 Shaw & Dun. No. 85.; Learmouth, June 1, 1826; 4 Shaw & Dun. No. 401; Kidd on Corporations, p. 15—20; Perth, Feb. 11, 1741 (Elchies v. Burgh Royal, No. 16.)

Respondent's Authorities. — Wight, 337; Perth, 16 Feb. 1780; Connell, 385.

RICHARDSON and CONNELL—MONCRIEFF, WEBSTER, and
THOMSON,—Solicitors.

No. 14. THOMAS EARL OF STRATHMORE, Appellant.—*Attorney-General*
—*Robertson*.

JOHN EARL OF STRATHMORE'S TRUSTEES, Respondents.—
Lushington—Rutherford.

Tailsie—Trust—Title to pursue—Statute—Death-bed.—The House of Lords affirmed (ordering costs to be paid out of the trust estate) a judgment of the Court of Session, adhering to an interlocutor of the Lord Ordinary, finding that an heir excluded by a deed of entail and deed of nomination of heirs, executed according to the lawful powers of the granter, from an heritable succession in Scotland, had no legal title or interest to challenge a trust-deed as disposing of that succession in an irrational or otherwise illegal manner; the connexion between the trust and the other deeds not being such as to infer, that if the trust-deed were liable to relevant objections from the nature of its provisions, the entail and nomination must thereby be rendered invalid; that the objects and purposes of the trust-deed were clearly and intelligibly expressed; and there is no rule or principle established in the law of Scotland which renders it unlawful for a man, who is *rei suæ arbiter*, to appropriate the rents and profits of his estate under a trust in the manner provided by the trust-deed under reduction; that the case of the rents of heritable estates in Scotland being expressly excepted from the provisions of the Act 39th and 40th Geo. III. c. 98, while they are clearly extended to personal funds in Scotland, any implication involved in that exception is against the supposition of any nullity being understood to be established by the common law of Scotland, in such a trust, for the accumulation of rents or other funds for a limited term; that the heir has no title or interest, under the Act of 39th and 40th Geo. III., to challenge the settlement of personal estate; that he cannot insist in the reduction of the last deed, on the head of death-bed, in respect that his title and interest are excluded by the previous deeds; and the last deed does not revoke, but substantially confirms all the prior deeds.

March 23, 1831.

1st Division.
Lord Moncrieff.

JOHN, tenth Earl of Strathmore, the representative of a noble family, and to whom extensive possessions and honours had descended through a long line of ancestry, held his titles to his landed estates in fee simple. On the 15th December 1815 he executed a strict entail of the Barony of Glamis and his other Scotch estates in favor of himself and his issue, in a certain order, "whom failing, to any person or persons to be named by him in any nomination or other writing to be executed by him at any time of his life;" whom failing, to the party in right for the time to the earldom of Strathmore. This deed, proceeded on the narrative that it was for the better preservation of his estates, family, and name, and reserved full power and liberty to himself, at any time of his life, to revoke or alter in whole or in part, and to burden and affect with debt the lands

and other heritages (therein) before disposed, and generally to March 28, 1831.
manage and dispose of the same in every respect as if he were absolute fiar thereof, and had not granted the said deed. On the same day he made a deed of nomination, which, after narrating the execution of the entail, and that he was “ resolved “ to exclude the Hon. Thomas Bowes, my only surviving “ brother-german, and John Lyon of Hetton House in the county “ palatine of Durham, and Charles Lyon his brother, from ever “ succeeding to my said estates,” he appointed that “ in case of “ the failure of heirs whatsoever of my body, and the heirs of “ their bodies, my said lands and estate shall devolve and belong “ to the heirs male of the body of the said Thomas Bowes “ successively in their order, &c.; whom failing, to the persons “ having right for the time to the titles, &c. of Earl of Strath- “ more and Kinghorn, &c., other than and except the said “ Thomas Bowes, John Lyon, and Charles Lyon, all and each “ of whom are hereby specially excluded and debarred from “ ever succeeding to or enjoying my said lands and estate;” but always with and under the provisions, restrictions, &c., clauses irritant and resolute, &c., contained in the foresaid disposition and entail; and declaring that the said disposition and entail was granted and should be accepted by the heirs of entail, &c. with and under the burden of a trust-disposition granted by him of the same date (of which below); it was also declared that this deed of nomination should be held and received as a part of the said disposition and entail, and power to alter and revoke was reserved. On the same day, and with reference to the entail and deed of nomination, he executed a disposition in favour of trustees, which proceeded on the narrative that he was “ resolved “ that my lands and estates in Scotland now belonging to me, “ together with such other lands and estates there as shall be “ acquired by me or my trustees after named in manner after “ specified, shall, in terms of the entail and deed of nomination “ and appointment before narrated, failing heirs of my own body, “ devolve upon the heirs male of the body of the said Thomas “ Bowes and the other heirs of tailzie therein mentioned, and “ that for the periods after specified; and while any debts “ affecting my Scotch estates remain unpaid the same shall be “ possessed by my trustees after named; and that the rents, “ profits, and emoluments thereof, and prices of woods allowed “ to be cut and sold by my said trustees as after mentioned,

March 23, 1831. " together with the produce of my personal estate, and debts
" due to me in Scotland, shall be applied by them to the pur-
" poses after specified." He therefore disposed to the trustees,
and to such other person or persons as should be named by him
by any writing under his hand, or assumed after his death by
the trustees, a majority for the time being a quorum, the earl-
dom, &c. and his whole heritage within Scotland belonging or
which might happen to belong to him at his death, with all
debts, sums of money, heritable or moveable, &c., due to or
belonging to him in Scotland; " but in trust to and for the
" uses, ends, and purposes after specified; viz. that my said
" trustees or trustee may, immediately after my death, establish,
" in their or his person or persons, a valid feudal title to such
" lands and other heritages as may belong to me at my death,
" but which are not specially described in the entail executed by
" me as aforesaid, and shall then convey and make over the
" same to my said heir of entail and the other heirs of tailzie
" thereby appointed to succeed to him or her; but always with
" and under the provisions, restrictions, &c. contained therein, and
" in the said deed of nomination and appointment, and also under
" the burden of this trust-disposition; and shall cause record
" such entail to be executed by them in the Register of Tailzies,
" and also in the books of Council and Session; and that the
" debts, sums of money, arrears of rent, sums due upon bonds,
" heritable or moveable, bills, contracts, &c. herein-before dis-
" posed, and the prices of woods allowed to be sold as after
" mentioned, may be uplifted; and also that my moveable estate
" and effects in Scotland before conveyed, (with the exception
" of the furniture and other effects in Glammis castle,) which
" shall belong to me at my death, may be sold, and that the
" price and produce thereof may be applied to the purposes after
" mentioned; viz. payment of debts, of the expense of the trust,
" &c. maintaining in repair the castle of Glammis, &c. payment
" of legacies, &c.; and, lastly, my said trustees shall apply, lay
" out, and invest the rents and produce of my said estates, and
" debts and other effects hereby conveyed to them, and prices
" of wood allowed to be cut as after mentioned, either in the
" purchase of government securities or on heritable securities
" in Scotland, as they shall think most advisable, until an
" opportunity offers of applying the same to the purchase of
" lands in Scotland, situated as contiguous and convenient as

“ may be to my said tailzied estate ; and when such opportunity March 23, 1891.
“ shall offer the said trustees or trustee acting for the time shall,
“ at their discretion, apply the said rents and debts, and the
“ produce of the said effects, with the growing interest thereof,
“ from time to time, on such purchases; and after establishing
“ a proper feudal title to the lands and others so to be purchased
“ in their own persons as trustees foresaid they shall execute
“ an entail or entails thereof in favour of the person who, by
“ the foresaid entail and nomination executed by me, shall
“ have right for the time to my said tailzied estate under
“ the burden of this trust, and of the other heirs of tailzie
“ thereby appointed to succeed to him; but always with and
“ under similar provisions, restrictions, &c. contained in my
“ said entail, and also under the burden of this trust, which
“ shall extend to the lands so to be acquired and entailed by my
“ said trustees as well as to the lands which shall belong to me
“ at my death, and which are hereby conveyed to them; and
“ which entail or entails my said trustees shall immediately
“ record in the Register of Tailzies, and also in the books of
“ Council and Session; and further, I hereby declare that this
“ trust shall subsist till all the debts, legacies, donations and
“ others payable out of my Scotch estate as aforesaid shall be
“ paid and extinguished, and for the space of thirty years from
“ the day of my death, and until the death of the longest liver
“ or survivor of the said Thomas Bowes my brother, and of
“ John Lyon of Hetton House in the county palatine of Durham,
“ and Charles Lyon, brother of the said John Lyon; and im-
“ mediately after the expiry of thirty years from the day of my
“ death, and after the death of the longest liver or survivor of the
“ said Thomas Bowes, John Lyon, and Charles Lyon, and when-
“ ever the debts, legacies, donations, and others shall have been
“ paid as aforesaid, this present trust shall fall and become ex-
“ tinct; but declaring always, that in case the said Thomas Bowes
“ should die, leaving a child or children succeeding to the title
“ and dignity of the Earl of Strathmore and Kinghorn, and
“ having right to succeed to the said estates as heir of entail
“ therein, his said trustees might, after the expiry of thirty years
“ from the day of his the said earl's death, and in case the other
“ purposes of the said trust are then completed, convey and
“ make over or cede and give up possession of the said estates,
“ together with the furniture and other effects in his said man-

March 23, 1831. “ sion-house of Glammis Castle, to such child or children, and
“ that although the said John and Charles Lyon, or either of
“ them, might be then living ; and in like manner, in case the
“ said John Lyon shall die leaving a child or children succeeding
“ to the said title and digniy, and having right to succeed to the
“ said estates as heir of entail therein, the said trustees may,
“ after the expiry of thirty years from the day of his death, and
“ in case the other purposes of the said trust are then completed,
“ convey and make over or cede and give up possession of the
“ said estates, together with the furniture and other effects in the
“ said mansion-house of Glammis Castle, to such child or chil-
“ dren, and that although the said Charles Lyon may be then
“ living ; but with this special condition and provision always,
“ that in case the said John Lyon or Charles Lyon shall at any
“ time thereafter succeed to the said title and dignity by the
“ death of the child or children of the said Thomas Bowes, or
“ of the said John Lyon, who shall have had right to succeed to
“ the said estates as heirs of entail therein, and have been put
“ in possession thereof as aforesaid, then this present trust shall
“ revive, and the said trustees shall be entitled to resume pos-
“ session of the said estates, and the said John Lyon and Charles
“ Lyon shall be excluded from the said estates, and from the
“ rents and profits thereof, during their respective lives ; but
“ declaring, that in case the said title and dignity of Earl of
“ Strathmore and Kinghorn shall descend to the said John Lyon,
“ he shall be entitled from the said trustees to the sum of £2,000
“ sterling yearly, from the time of his succession to the said title
“ and dignity, during his life, and no more ; and in case the said
“ title and dignity shall descend to the said Charles Lyon, he
“ shall likewise be entitled to receive from the said trustees the
“ like sum of £2,000 sterling yearly, from the time of his suc-
“ cession, during his life, and no more ; and after the said debts,
“ legacies, donations, and others payable out of his the said
“ Earl's Scotch estates shall be paid and extinguished as afore-
“ said, and after the space of thirty years from the day of his
“ death, and after the death of the longest liver or survivor of
“ the said Thomas Bowes, John Lyon, and Charles Lyon, his
“ the said earl's heirs of entail for the time shall be immediately
“ entitled to enter to the possession, not only of his said entailed
“ estate, in terms of the foresaid entail and deed of nomi-
“ nation executed by him as aforesaid, but also of any other

“ estates in Scotland which might thereafter be acquired by him March 23, 1820.
 “ or by his said trustees, and which should be entailed by him
 “ or by them in terms of the said trust-disposition, and the said
 “ trustees or trustee acting for the time shall then be bound to
 “ cede the possession of the said estates to the said heir of tailie,
 “ together with the furniture and other effects in the said man-
 “ sion-house of Glammis Castle; and in case the sum in the
 “ hands of his said trustees, together with what they shall have
 “ received and invested, or placed out at interest as aforesaid,
 “ shall not exceed the sum of £4,000 sterling, they are thereby
 “ empowered and directed to pay and make over the same, with
 “ all the securities they may hold therefor, to his said heir of
 “ tailie, who will then be entitled to the possession of the said
 “ taillied estate, upon his granting a receipt therefor, and a dis-
 “ charge and ratification of all the transactions and management
 “ under the said trust, and also ratification of the whole settle-
 “ ments executed by him the said earl, as well with regard to
 “ his English as his Scotch estates; but if the sum in the hands
 “ of his said trustees, and what has been received and invested,
 “ or placed out at interest as aforesaid, shall exceed the sum of
 “ £4,000 sterling, they shall be bound to retain the same, not-
 “ withstanding they shall have then ceded the possession of the
 “ said taillied estate to the heir of entail entitled thereto, and
 “ shall employ it, together with the growing interest and pro-
 “ duce thereof, when an opportunity offers, in the purchase of
 “ other lands to be entailed by them as aforesaid:” “ With and
 “ under all which conditions and provisions” the said trust-deed
 is declared “ to be granted, and no otherwise.” The deed con-
 cludes with the usual clause, reserving power to recal, or alter,
 sell, or gratuitously dispoise, and generally to do any thing con-
 cerning the same, &c.; with dispensation from delivery in com-
 mon form.

The usual powers were given to the trustees, and they were
 named sole executors and intromitters with the moveable estate
 in Scotland; all which powers were stated to be conferred, to the
 end that the trustees might more effectually execute the purposes
 of the trust.

On the 1st of July 1820 the Earl executed another deed,
 which, after referring to those above narrated, and stating the
 previous appointment of trustees, and the conveyance in their
 favour, proceeded thus:—“ Having full trust and confidence

March 23, 1831. " in John Dean Paul of the Strand, Esq. (now Sir John),
 " I do hereby nominate and appoint the said John Dean Paul
 " to be one of my trustees and executors under my said trust-
 " disposition, along with the trustees and executors therein
 " named; and I give, grant, and dispone to him, along with
 " the trustees named in the said trust-disposition, all and sundry
 " the earldom, lordships, &c. and other heritages therein speci-
 " fied, upon the same trusts and for the same uses, &c. in the
 " said trust-disposition contained, &c.; and I direct these pre-
 " sents to be held and taken as a part of my said trust-disposi-
 " tion, and in all other respects I confirm the same; and I
 " consent to the registration hereof in the books of Council and
 " Session in Scotland," &c. The Earl died on the 3d of the
 same month without lawful issue.* By this event his brother
 Thomas became Earl of Strathmore, whose eldest son became
 Lord Glamis.

The trustees made up titles and took infestment under the dis-
 position, and Lord Glamis was thereafter served heir of tailzie
 under the deed of entail, and infest in virtue of a charter of
 resignation. The estates yielded upwards of £12,000 per
 annum, and it was alleged that the accumulation at the end of
 the thirty years would amount to several millions. After being
 unsuccessful in an action of aliment against the trustees†, the
 Earl raised a summons of reduction, declarator, and adjudi-
 cation against the trustees and Lord Glamis, the object of
 which was to set aside the trust disposition, entail, and deed of
 nomination executed on the 15th of December 1815, also the
 deed of the 1st of July 1820, and the service and titles in favour
 of Lord Glamis, and to have it declared that, as heir male or
 of line to his brother the late Earl, or to his father the preceding
 Earl, he had right to the estates, and, as next of kin to his
 brother, he had right to the moveables.

The pleas in law relied on by the pursuer in support of his
 action, and by the trustees in defence, were substantially the

* In 1811 the Earl had a natural son by Mary Milner, an English woman. The parties were domiciled in England, and the child born in England. A few hours before his death he married the mother in England; but a Committee of Privileges of the House of Lords decided that this marriage did not legitimate the son. See Appendix to 4 Wilson and Shaw.

† See 2 Shaw and Dunlop, No. 80, and 1 Wilson and Shaw, No. 41.

same with those afterwards urged at the bar of the House of Lords. March 28, 1831.

The Lord Ordinary found, “ That the late Earl of Strathmore
“ held the estates mentioned in the summons in absolute fee
“ simple, and had full power to dispose of them in any man-
“ ner not prohibited by law : Finds, that by deed of entail, of
“ date 15th December 1815, the said Earl did, in due and law-
“ ful form, dispoise the said estates to himself and the heirs male
“ of his body ; whom failing, to the heirs whatsoever of his body ;
“ whom failing, to any heirs to be named by him by any deed
“ of nomination or other writing : Finds, that by deed of nomi-
“ nation of date the said 15th December 1815, executed in due
“ and lawful form, the said Earl declared his will and intention
“ to exclude entirely from the succession to his said estates the
“ pursuer, then the Honourable Thomas Bowes, who was the
“ heir presumptive by the standing investitures, and also John
“ Lyon and Charles Lyon, esquires, and did by the said deed
“ nominate and appoint the heir male of the body of the said
“ Honourable Thomas Bowes, and a series of other heirs therein
“ mentioned, to be the heirs of tailzie entitled to succeed to the
“ said estates, failing the heirs male and female of the said Earl’s
“ body, as provided in the said deed of entail : Finds, that by
“ certain clauses in the said deeds of entail and nomination, the
“ conveyance, and all the rights thereby created, are declared to
“ be subject to the burden of a trust-deed executed of the same
“ date, of 15th December 1815, and the whole conditions and
“ provisions therein expressed, but that in other respects the said
“ deeds of entail and nomination constitute a complete settle-
“ ment by entail in favour of the heirs thereby appointed, to the
“ entire exclusion of the said pursuer : Finds, that by trust-
“ deed, bearing date the said 15th December 1815, executed in
“ due and lawful form, the said Earl conveyed the whole of the
“ said estates, and also his whole moveable funds and effects, in
“ the event of his own death, to the defender James Dundas
“ Esquire, and certain other persons, as trustees, for certain ends
“ and purposes therein specified, and that the objects of this
“ trust appear to be clear and distinct ; viz. on the one hand to
“ accumulate the rents of the existing estate and any residue of
“ the personal funds, after paying the testator’s debts and certain
“ legacies provided during thirty years, to be employed in the
“ purchase of lands to be added to the entailed estates, and, on

March 23, 1831. “ the other, to continue the trust and the employment of the
“ rents during the lives of the said Honourable Thomas Bowes,
“ and of John Lyon and Charles Lyon, except in the special
“ case of a son of the said Hon. Thomas Bowes, or of the said
“ John Lyon, having right by their deaths respectively to
“ the honours and dignities of the family, in which event the
“ trustees are directed to convey the estates to such son, to whom
“ they are destined by the deed of entail : Finds, that by deed
“ bearing date the 1st day of July 1820, the testator, on the
“ narrative of the previous entail and trust-deed, nominated and
“ appointed the defender, Sir John Dean Paul, to be trustee
“ along with the persons appointed by the previous trust-deed,
“ and of new disposed the whole estates and funds to him and
“ the other trustees, under all the clauses and conditions of the
“ said former deed : Finds, that the said Earl of Strathmore died
“ on the 3d day of July 1820; and that it is averred by the pursuer,
“ and though not admitted is not denied by the defenders, that
“ he was ill of the disease of which he died at the date of the said
“ last-mentioned deed, on the 1st day of July 1820. In this
“ state of the case, Finds, 1mo, That the grounds of reduction
“ insisted in have no application to the deed of entail or the deed
“ of nomination, except in so far as these deeds are connected
“ with the trust-deed, as being qualified and burdened with the
“ title and provisions thereof; and finds that that connexion is
“ not such as to infer that, if the trust-deed were liable to rele-
“ vant objections from the nature of its provisions, the entail
“ and nomination must thereby be rendered invalid; therefore
“ finds, 2do, That the pursuer has no legal title or interest to
“ insist in his grounds of reduction of the trust-deed, being va-
“ lidly excluded from the succession by the deeds of entail and
“ nomination executed according to the lawful powers of the
“ granter : Finds, 3tio, That the objects and purposes of the
“ trust-deed are clearly and intelligibly expressed; and finds that
“ there is no rule or principle yet established in the law of Scot-
“ land which renders it unlawful for a man, who is rei suæ ar-
“ biter, to appropriate the rents and profits of his estate, under a
“ trust, in the manner provided by the trust-deed under reduc-
“ tion : Finds, 4to, that the case of the rents of heritable estates
“ in Scotland being expressly excepted from the provisions of the
“ Act 39th and 40th Geo. III. c. 98, while they are clearly
“ extended to personal funds in Scotland, any implication in-

“volved in that exception is against the supposition of any March 23, 1831.
 “nullity being understood to be established, by the common law
 “of Scotland, in such a trust for the accumulation of rents or
 “other funds for a limited term: Finds, 5to, that it is averred
 “that there is a considerable sum of the personal estate of the
 “late Earl still in the hands of the trustees, but that this averment
 “is denied by the defenders; but finds it unnecessary to direct
 “any inquiry into this matter, in respect that the pursuer has no
 “title or interest under the Act of 39 and 40 Geo. III. to
 “challenge the settlement thereof, it being provided by the said
 “act that all the money accumulated contrary to its enactment
 “should belong to the party who would have right thereto if no
 “such accumulation were directed: Finds, 6to, That the pursuer
 “cannot insist in the reduction of the last deed on the head of
 “death-bed, in respect that his title and interest are excluded by
 “the previous deeds, and the last deed does not revoke, but sub-
 “stantially confirms, all the prior deeds; therefore sustains the
 “defences, and assoilzies the defenders from the whole conclu-
 “sions of the libel, and decerns; but finds no expenses due.”*

On the case being brought before the First Division, their Lordships [16th Feb. 1830], without requiring cases, and after hearing merely counsel for the pursuer, adhered.†

The pursuer appealed.

Appellant—(As to title).—There is no sound objection to the appellant's title to sue. In the situation in which the entail stands, the appellant's being excluded by that entail from the succession is of no consequence; for the entail, the nomination of heirs, and the trust-deed must be considered in law as one

* His Lordship added, in a Note:—“The pursuer rests his case mainly on the
 “case of M'Culloch of Barholm, Nov. 28, 1752, shortly reported by Lord Elchies.
 “The Lord Ordinary has carefully considered that case in the papers, both those
 “shown to him preserved with the reports of Lord Elchies and those in the collec-
 “tion of Lord Drummorie, who was Ordinary in the cause, and he is completely
 “satisfied that the decision pronounced can only be supported as a judgment on a
 “very special case, on the ground alluded to in a short note of Lord Drummorie,
 “when the hearing was ordered, that the settlement could not be sustained as being
 “unintelligible, inexplicable, et contra bonos mores. At all events he sees no ground
 “for holding that that decision did or could establish any general principle in the law
 “of Scotland, to prevent a proprietor in fee simple from vesting his estate in trust for
 “accumulation during a limited course of years; and the Lord Ordinary is not
 “aware of any legal ground on which this can be maintained.”

† 8 Shaw and Dunlop, No. 248.

March 23, 1831. act and deed, and as component parts of the same settlement. They must stand or fall together, and no one of them without the other can be supported as embodying or expressing the last will of the deceased. (On merits.) The settlement of Lord Strathmore, having for its chief object the prevention of enjoyment, and the locking up of the subjects for the sole purpose of accumulating their produce, without any onerous or reasonable cause, for a long period of time after the death of the granter, and containing besides many other irrational and inconsistent and contradictory provisions, is liable to reduction as adverse to the principles of the common law of Scotland, and contrary to reason, natural justice, and public policy. This proposition is fully warranted by the case of *M'Culloch v. M'Culloch*, Nov. 28, 1752 *; and this being a question of general prin-

Nov. 28, 1752. * JOHN M'CULLOCH of BARHOLM against JOHN, WILLIAM, HENRY, JEAN, and MARY M'CULLOCHS.

Tailzie—Trust.—Settlements containing irrational and ridiculous provisions, and locking up or limiting the enjoyment of the rents and produce of the estates, real and personal, conveyed for many or what might prove many years, reduced at the instance of the heir.

John M'Culloch, besides property which he acquired himself, inherited from his ancestors the lands of Barholm, producing about five hundred merks of yearly rent. He married Jean Gordon, who succeeded to the lands of Culvennan. They had one child, who married David M'Culloch, and had John, and Elizabeth. Barholm and his lady settled in strict entail, except a small portion lying contiguous to Barholm's own property, the estate of Culvennan, upon the daughter (married to William Gordon), and the heirs of her body, with a substitution in favour of her brother and the heirs of his body. The brother John, by consent of his father, had already been married to Elizabeth Cutlar, daughter of Cutlar of Argreenan, in whose marriage articles it is said to have been stipulated that the grandson was to be put in immediate possession of the lands of Barholm. Of this marriage there were born John, and two other sons and two daughters. In the year 1742 Barholm executed a deed of tailzie, comprising his own paternal patrimony and part of his wife's lands, about the annual value of £50 per annum, for new infestment to himself and Jean Gordon his spouse, and longest liver of them two in liferent, and to John M'Culloch his grandson and the heirs male of his body in fee, with a long series of substitutions, under strict prohibitive, irritant, and resolute clauses. This tailzie refers to a separate deed, executed by Barholm, with consent of his grandson, of the same date, relative to the personal estates in favours of certain trustees, containing also an assignment of the rents of the tailzied estate for the space of sixty years after the death of the longest liver of Barholm and his wife, for certain uses and purposes therein specified, which trust-right and assignment of the rents the heirs of entail are taken bound to ratify under an irritancy. By this tailzie liberty is granted to the several heirs of entail, male or female, to provide their respective spouses to a fifth part of the free rent of the whole estate, by way of locality, in

ciple, alike applicable to every country, we may look to the analogy afforded by the law of England, where this view is

March 23, 1851.

lieu of terce and courtesy ; but it is nevertheless provided, that such life-rent localities should not impugn or weaken the assignment of the whole rents by the trust-deed, and that the same should only take effect after the years of which the rents were assigned, that is, at the end of sixty years after the death of the longest liver of Barholm and his wife ; and, in the last place, it reserves a faculty and power to Barholm to revoke, rescind, or alter the same, in whole or in part, by any writing to be signed by him at any time in his life, etiam in articulo mortis, excepting the lands of Peble, which Barholm thereby renounces all power or faculty to burden, affect, or alter the destination of ; and provides, that these lands of Peble shall fall and belong to the said John M'Culloch and his heirs, under the conditions, limitations, and irritancies above expressed, free and clear of any power in him to alter the same, and of any life-rent competent to him, or to Jean Gordon his spouse, of and concerning the same.

By the separate deed of trust (and which referred to the above-recited disposition of tailzie) Barholm assigned and made over to the trustees therein named all debts and sums of money, heritable and moveable, then resting or that should be resting to him at his death, all rents and arrears of rents, goods, gear, &c. (in all about £6,000), and more particularly the rents of his whole estate for the space of sixty years from the first term preceding the death of the longest liver of him and his wife, and hail growing wood upon said estate during the aforesaid space, in trust, First, for payment of his whole debts, and funeral expenses of the longest liver of him and his wife : Secondly, for purchasing in certain parishes any lands lying near the lands already belonging to him that might be offered to sale, as an addition to the tailzied estate, under the like provisions, limitations, conditions, irritancies, &c. ; in default of these being purchaseable the trustees were bound to apply the trust subject for the other uses and purposes in the deed specified : Thirdly, for purchasing other lands, not below 1,500 merks and not exceeding 1,800 merks of yearly rent, in favours of the second son to be procreated of the body of John M'Culloch, his grandson, and the heirs whatsoever of the body of the said second son, with certain remainders over ; and failing these, to return to his heirs of tailzie : Fourthly, for purchasing other lands of the like value and extent in favours of the third son to be procreated of the body of the said John M'Culloch, his grandson, with certain remainders over, and with the like return to the family : Fifthly, for making the like purchases of other lands, to the like extent, for behoof of each of the other younger children to be procreate of the body of the said John M'Culloch, his grandson, and the heirs of their respective bodies, with certain remainders over, and under the like clauses of return : Sixthly, he appoints the several lands thus to be purchased for behoof of his younger great grandchildren to be settled upon them severally by his trustees in the form of as many strict entails, with and under the same provisions, limitations, conditions, declarations, clauses irritant and resolute, as are contained in his tailzie of the lands of Barholm, excepting only the obligation thereby put upon the heirs of entail to use the designation of Barholm ; providing nevertheless, that the trustees should not denude of these purchases so to be made until such time as the younger great grandchildren severally should be married, and in the meantime that the rents of the lands so purchased should be added to the funds for making other purchases : Seventhly, if any funds remained after all these purchases, he directs the like purchases to be made for the behoof of his great great grandchildren, and these also to be settled in the form of as many strict entails. In 1746 Barholm and his spouse executed another trust-disposition, whereby, inter alia, they assigned and made over to the trustees therein named, for the uses and purposes therein-after expressed, the hail rents of his estate, comprehending the rents of Barholm and Peble, together with other subjects

March 23, 1831. supported to the fullest extent, and the point now brought by statute to a precise and definite limit. No doubt the statute

specified in this second trust-right, without any limited endurance in point of time, but for such a number of years, next and immediately after the death of the longest liver of him and his wife, as should be sufficient for answering the ends and purposes in the said deed expressed ; the particulars of which are :—

In the first place, he thereby confirms to John M'Culloch his grandson the rents of the lands of Barholm, but under this limitation, that he should have no right or interest in the growing woods ; and he thereby further allows to his said grandson the rents of Bardrstram and two parts of Clachrig and Camrid, in all about 300 merks more ; and he declares that the rents of Bardrstram, Clachrig, and Camrid shall not be arrestable or affectable by his creditors, but should continue under the management of the trustees, and that these trustees should apply the rents for purchasing victual and other necessities for his grandson's family. Secondly, he appoints the rents of his whole other lands to be applied for portioning the other children of his grandson John M'Culloch, in such manner that each of these younger children, not exceeding the number five, should have five full years' rent of his estate, (deducting the life-rent provision made to the grandson, an annuity of 300 merks payable to David M'Culloch, and a provision made to Elizabeth Cutlar, in case it fell due,) and if six or more, that they should severally be entitled to four years' rent ; that these rents should be applied in purchasing lands for behoof of these children respectively, to be settled upon them in the form of as many strict entails, under the same limitations, restrictions, and irritancies as in the bond of tailzie of the estate of Barholm, &c., but so as that these children should not be entitled to the benefit of these provisions, or of the lands purchased for them severally, till they should attain to the years of majority or marriage ; and in the meantime, until these children should be married or attain the years of majority, and after majority if the children did not then claim their portions, that the annual rent, or the money, or the rents of the lands so to be purchased, should go in with the other subjects to increase their portions. Thirdly, it is provided that "if any of the said children die without succession of their own bodies, then the second male child next in age shall succeed ; or, failing of males, the second female shall succeed. If Jean M'Culloch shall die without children, then Mary's second son or daughter shall succeed ; and if Mary M'Culloch shall die without children, then William's second son or daughter shall succeed ; and if William M'Culloch shall decease without succession of his own body, then his brother Henry, his second son or daughter, shall succeed. The succession shall go on in like manner to all their brethren and sisters that may be born ; and if all of them shall die without issue of their own bodies, then John's second son (who is our heir), and the other brothers and sisters that second shall have, shall succeed every one of them to have a share as it is proportioned." Fourthly, it is appointed, and the trustees are empowered "to settle the five children of the said John M'Culloch, our grandson, in that part of Balhassie we now possess, and in the house we dwell in, and office houses about it ; and we hereby assign them our cattle of all kinds, and also our crop, with all our household plenishing ; only our heir is to have right to what silver plate there is, and the two best horses, and two mounted beds, when the children are disposed of. The children now existing are, namely, Jean, Mary, William, and Henry M'Cullochs. We allow them, besides the profits that may arise out of our present possession of Balhassie that we now occupy, the 400 merks payable to us out of the other parts of Balhassie, as they will need to be expended upon them ; and they are to have all the presents and services belonging to us, excepting the flying presents and services on the south side of Mony-pool-burn, which are given to their father ; and the said trustees are to provide a virtuous modest woman

contains the exception, that " nothing in this act contained shall March 23, 1831.
 " extend to any disposition respecting heritable property within

to take care of the children and their family, and they are also to provide a plain sober man to educate and teach the children. There is none to be entertained with them in their family, friend or other, but necessary servants; and if any shall remove the children, then the profits of present possession, with what else is allowed for their maintenance, shall be withdrawn, and applied as our rents are to be; only the trustees are not to set the piece of ground we now possess, but to keep it open for the children to return when they please. This settlement for their maintenance is not to take effect till after the death of the longest liver of us two. Any other children the said John M'Culloch may have in this present or any subsequent marriage are to be brought here at four years of age, and maintained and educate with the other children; and if any of the children shall be taken away, or all of them shall go away, then every thing that is allowed for their support shall be withholden from them, and applied as our other rents are appointed by us to be. When the girls come to be ten to eleven years of age there is a discreet prudent woman to be brought to the house, and kept half a year or a year with them, to teach them to make and dress their own clothes; and the boys are to be taught their Latin and Greek, writing and arithmetic, at home, and all of them to wear cloth made in the country."

In the same year Barholm and his spouse executed a second disposition or deed of tailzie, containing procuratory of resignation for new infeftment to be granted to himself and spouse, and longest liver of them two, in life-rent, and to John M'Culloch the defender, their eldest great grandson, and the heirs male of his body, in fee, with a long series of substitutions, and under the like provisions, conditions, &c. as in the tailzie 1742; and more particularly providing, that it should not be leisome to any of the heirs of tailzie to quarrel or impugn the assignation of the rents and duties of said lands and estate made by him to certain trustees, for the uses and purposes therein specified. Power to innovate or change the same, in whole or in part, by a writing under his hand, at any time in his life, etiam in articulo mortis, was reserved by Barholm. Thereafter Barholm, with consent of his spouse, and, as alleged, when upon death-bed, executed a third tailzie, in substance the same with the two former, John M'Culloch, the great grandson, being preferred to his father; and certain lands lately acquired were made part of this settlement; and of which it is an express condition, that the heirs of tailzie should not quarrel or impugn the trust assignation to the rents of these lands for the uses and purposes to which they were destined, the contravention of which, as of all the other conditions and limitations, is made an express irritancy of the right. By this tailzie also it is provided, that the hail heirs of tailzie above mentioned shall enjoy, bruik, and possess the said lands and estate, and every part and portion thereof, by virtue of this present tailzie, and infeftments, rights, and conveyances to follow hereupon, and by no other right or title whatsoever.

After Barholm's death, John the grandson having come to the resolution of quarrelling Barholm's settlements, granted a trust-bond to David Maxwell, in order to lead an adjudication upon a special charge, to be the title of challenge. In the reduction which followed, John's children, and the other substitutes in the entail, were made parties defendants. The pursuer maintained, inter alia, (various points having been raised, and among others the objection that the last deed had been executed on death-bed,) that Barholm had, by his settlements, not only tied up the property of the estate by a strict entail in terms of the statute 1685, but had also sunk the rents of his estate for a great while after his death, and had locked them up, in order to raise irrational provisions for his younger great grandchildren, while in the meantime the heir of tailzie was left to

March 23, 1931. "that part of Great Britain called Scotland;" but this exception was introduced because it was unnecessary to extend the protection of the statute to Scotland, seeing that the common law of that country was in itself sufficient to prevent undue accumulation. Surely the exception could not have been made

starve, and without the possibility of obtaining a proper education, while the destination to and obligations incumbent on the younger children are preposterous, perplexed, and inextricable. Barholm's settlements are so constructed that they must stand or fall together; the good cannot be separated from the bad. If any be such as law and good conscience must condemn, the deeds must be reduced in toto; they receive no support from the law of entail. It was, before the statute 1685, justly doubted whether clauses *de non alienando et contrahendo* were consistent with the nature of property or the general principles of law; but in every view the power given by the statute will not authorize a testator to indulge in whimsical conceits, or injure his family by irrational, extravagant, and preposterous provisions, locking up estates for ages, securing from them the least possible advantage to his family, and leaving his immediate descendants in poverty or ignorance. Now it is impossible to deny, regarding the deeds separately or collectively, that this is not their character. Looking to the number of younger children born, and the possibility of others being born, and the time that must have elapsed before their provisions could have been made up, they might be fifty years of age before they could enjoy these provisions; in any way, not less than twenty-five years would have been requisite to raise provisions to five younger children. If a settlement, having such an object, be sustained, there is no point where you can stop. Ingenious conveyancers will speedily devise clauses whereby not merely property, but the first fruits of that property, may be locked up for generations. But besides these settlements being irrational, extravagant, illegal, and *contra bonos mores*, they are in many particulars utterly inexplicable.

In defence it was stated:—Barholm held without limitation the estates which had descended to him; he was equally in uncontrolled dominion of the estates he had bought; and it is an incident of property that the owner shall have full power of directing its descent after his death. This should be treated as a mere question of power. He could have given his whole estates to a charity; much more can he cut and carve out what interest he intends shall devolve upon his own family. There was nothing to prevent Barholm to settle the fee on one person, and yet for any number of years settle the rents on others, excluding for the time the *fiar*. Aware of this, the pursuer exaggerates the features of the settlements, challenges and attempts to represent them as preposterous and irrational. But that proceeds on palpable misrepresentation of the provisions and the facts under which they may be applicable. In the true view of the subject, the testator did not dispose of more than ten years' rents of his property; but taking it at twenty-five, surely that was legally within his power. Could he not, by means of a conveyance to trustees, have tied up the rents for twice the time; and where is the difference in principle? In point of fact, the children being very young, the ends of the trust behoved, morally speaking, to be accomplished long before the heir was of age. Barholm therefore had the power—he has not exceeded in point of time—and there is nothing in the conception of the provisions that should subject them to the heavy penalty of being utterly reduced.

Upon the report of Lord Drummore, the Lords, before answer as to the reasons of reduction *ex capite lecti*, remit to the Lord Ordinary to admit the same to the pursuer's

for the purpose of insuring, in Scotland, in a worse shape, the existence of the evil thus corrected in England. Could the law of Scotland on this point have been regarded in any other light, the statute would have been exposed to have been utterly evaded by English parties making their accumulations Scotch; but at least it cannot be maintained that all accumulations, however excessive, can be supported; and if the question be one dependent on the discretion of the Court, the deeds in question cannot stand. They could not, if the accumulation had been "as long as the grass groweth up, and the water "runneth down," neither can they—looking to all the principles of analogous cases—in the instance now under discussion. 2. The settlements under challenge are not supported by the provisions of the Scotch statute 1685, c. 22., authorizing entails. The purpose of these settlements is totally different from what is declared in that statute to be the only legal object of tailzies. Here the Earl had in view, not the prevention of the alienation or dilapidation of the ipsum corpus of the estates, but the exclusion from enjoyment of the growing fruits of these lands for an indefinite period of time beyond thirty years certain after the granter's decease. 3. As far as moveable funds are to be accumulated the act of 39 and 40 Geo. III. c. 98. applies; for the exception there relates to Scotch heritage only. 4. The deed of 1820 had the effect of superseding the first trust-deed, and constituted a new trust-disposition of the lands, and, having been executed on death-bed, is reducible ex capite lecti. (As to costs.) The interlocutors appealed from find no expenses due to either party; but in questions like the present, whether the appellant be successful or not, it is the practice to order costs to be paid out of the trust-fund.

Respondents. — (As to title.) The appellant has no legal title or interest to insist in reduction of the trust-deed, seeing that the late Lord Strathmore was proprietor in fee simple of his estates, and by the deed of entail and relative deed of nomination absolutely excluded the appellant from any share in the succession. These deeds are not affected by the objections pleaded against

probation; and, having considered the other reasons of reduction, find the same relevant and proven, and therefore reduce the haill deeds in question, and decern and declare accordingly.

Counsel for pursuers, Alexander Lockhart—for defenders, Robert Craigie.

March 23, 1831. the deed of trust. The appellant cannot show that the trust-deed is so inseparably blended with the deed of entail that they could not subsist independently of each other; and so far as the present action concludes for reduction of the deed of assumption and nomination of the 1st of July 1820, he is barred by the previous conveyance in trust, and by the deed of entail, which were not revoked by the deed of the 1st of July 1820; farther, as that deed is an insulated deed, having no object or purpose but to name an additional trustee, it cannot affect the validity of the prior deeds, which are altogether separate and distinct, and must subsist and receive effect independently of it. (On merits.)—In the Court below the appellant strongly urged the illaudable and even mischievous object of the trust-deed, and the reprehensible motives which actuated the late Earl. There is no ground whatever for such charges; but clearly such inquiries are not *hujus loci*, for the present is merely a question of power; but the Earl being unfettered proprietor, holding in fee simple, had unchallengeable power to convey and destine his property in the way most agreeable to himself. There is nothing *contra bonos mores* in the settlements; they are expressed clearly and intelligibly, and do not counteract any known rule of Scotch law. The exertion of this power was also consistent with justice and prudence, having relation to the interest, honour, and domains of the ancient family which the Earl represented. There are some restrictions known in law, but the party who found on these restrictions must show that they are applicable; in this, however, the appellant has utterly failed, and until he can do otherwise it is in vain to rest on general maxims. It may be true that *interest reipublicæ nequis re sua male utatur*, but has he shown the *male utatur*? Except the case of *McCulloch*—a case which has almost slept in the records, and which undeniably proceeded on specialties—he neither can refer to statute or common law in support of his position. The difficulty which occurred in *Thelluson's* case was created by a peculiarity in the law of England; and, after all, the law as it now stands was introduced by statute, and in which Scotch heritage is expressly excluded. The argument raised on this point by the appellant is quite illusory. At common law there is no absolute prohibition to an accumulating trust; in introducing this exception, therefore, the legislature was not influenced by any supposition that the common law sufficiently

dealt with the subject. Besides it must be admitted that the statute March 23, 1831. applies to personal estate in Scotland. Now, as it cannot be pretended that, as regards accumulation, our common law knew any difference between heritage and moveables, it is plain that the legislature, had it been actuated by the view imputed to it, would have extended the exception to moveables as well as heritage; and not having done so destroys the whole of the appellant's argument. The Scotch heritage, being excepted, therefore remains subject to the Scotch law; and there is no authority for showing that an accumulating trust, such as the present, is exposed to any objection of illegality, inexpediency, irrationality, excessiveness, or unfairness. The deed of 1820 is not liable to reduction on the head of death-bed, as the previous deeds exclude the title and interest of the appellant, and, instead of revoking, the last deed confirms all the prior deeds; but in point of fact the Earl, when he executed that deed, was not ill of the disease of which he died. *

* The decision, *M'Nair v. M'Nair*, Bell's Reports, 546, was also relied on by the respondents. The following are the notes of the opinions of the Judges given on the two occasions when that case was advised. They are taken from the manuscript observations made by Lord President Campbell on his copy of the printed papers.

FIRST ADVISING.

Lord President.—In one particular the deed appears to be inconsistent; for by a clause in the principal deed certain sums are ordered to be paid to the male and female descendants at their age of twenty-five, besides other sums to indigent children, without being limited to the yearly produce of the estate, and therefore affecting the stock itself; and by the codicil there is to be a division of the free residue of the produce at the end of every seven years, yet it is evidently taken for granted in this codicil that the stock is to remain entire; consequently there may be no fund out of which the £50 and £25, &c. can be payable.

The whole is a very whimsical if not inextricable arrangement, and resembles very much the case of Lady Dick's settlement, which was intended in like manner as a perpetual mortification, or, as she called it, "a cautore" for her distressed children and grandchildren, under the conduct of her son Sir John Cuninghame and her daughter Lady Dalrymple, with power to them to name succeeding trustees, her jewels being deposited in a strong box for the use and ornament of her posterity to the tenth generation, and then to her nearest in kin. Her effects in general were also limited in the same manner to remain in trust for her posterity to the tenth generation for their maintenance and education, &c. The grounds of challenge were, 1. That the trustees had repudiated it; 2. That the destination was so irrational and whimsical as to be ultra vires of any proprietor; 3. That it is vacated ex presumpta voluntate defuncti from the eviction of a considerable part of the estate, the remainder not being sufficient to answer the purposes intended. Upon the second head the case of Barholm was quoted, and upon the third that of Sir James Rothead's settlements, where a large sum of money having been destined for

March 23, 1831.

LORD CHANCELLOR.—My Lords, this is a case of considerable interest, and of the greatest possible importance to the parties. It arises upon an appeal relative to three deeds respecting the same

purchasing lands to be added to the entailed estate, and the heirs of line having prevailed in a reduction of the tailzie of the estate, the destination of the money was found not to subsist, the settlement having failed in its principal object. The first objection received an answer from decisions finding that a settlement might subsist though the trust fell; and it is probable that, in setting aside Lady Cuninghame's settlement, the Court went upon the other two grounds.

A settlement in the form of a perpetual trust upon the heirs themselves is a novelty in the law of Scotland, neither agreeable to any principle of common law, nor deriving any support from the act 1685. The Court went far enough in the case of Lord Hyndford, where a temporary trust for special purposes was supported; and in that case the trust was not vested in the heir himself, but in third parties.

Suppose the pursuer were to make up complete titles as heir at law, and to sell the subjects, a purchaser would be safe upon the faith of the record, and those concerned in the succession would only have an action of damages against him; and suppose all those at present in existence were to agree to the measure, and to waive such action, the remedy at a distance of time to persons yet unborn might be very ineffectual.

But taking the case even as it stands at present, the reasons of challenge appear to be very strong, though the fact is not yet sufficiently cleared up as to the second ground, viz. the alleged insufficiency of the funds.

Monboddie.—Deed legal, and ought to be sustained.

Swinton.—For setting it aside. Testamenti factio est juris civilis, when a man ceases to live, cannot hold his property. It is the civil law, not the law of nature, that allows testamenti factio and substitution; but still the heir, when he succeeds, may do as he pleases. This case not a tailzie within the act of Parliament.

Justice Clerk.—To overturn wills of defuncts upon ideas of rationality is very delicate. If it be unlawful it ought to be set aside, but not otherwise, if it be at all extricable. It has lasted already twelve years, and may continue till it becomes inextricable. Entails introduced long before act of Parliament.

President.—For setting aside the deed.

Estgrove.—Had an inclination to set it aside, but hesitate at present, at the instance of the heir, who represents the granter.

Dunsinnan and Henderland.—Same.

Alva.—For setting it aside.

SECOND ADVISING.

Lord President.—The deed in question may be considered as meant for two purposes. 1. To settle the succession upon the eldest son, with the burden of provisions to the younger children and widow. 2. To create a perpetual trust in the heirs called to the succession, for behoof, not only of themselves, but of all the descendants of the granter to the end of time, so long as any should exist.

The first purpose was rational and legal, and the deed ought so far to have effect if it be possible to sustain it in part, and set it aside quoad ultra. The mode of provision is indeed somewhat unusual, by paying so much per day, or so much a year, to each child during life; but it is easily enough extricable in that shape; and the provisions to the widow are likewise reasonable, as well as the allowance to a particular servant and his wife so long as they continue performing the service required.

property. By a very ill-conditioned course of conduct — I can call it nothing else — arising from a dislike towards a brother, which nothing could justify a person feeling on his death-bed, — the Earl

March 23, 1831.

Neither is there much to be said against the provisions upon the widows of the sons, or even against the clause by which certain sums are given to each of the grandchildren by his six children when they attain to the age of twenty-five.

The result of these different clauses put together, so far as regards the younger children and grandchildren, is, that certain annuities are given to the children themselves, and the fee of certain sums to the grandchildren by these children.

Had the deed stopt there, Robert the eldest son would just have taken the succession with the burden of making the payments thus ordered to his mother and brothers and sisters, and their children attaining to a certain age; and there would have been nothing in this case to distinguish it materially from any other settlement in favour of an eldest son, with the burden of provisions to the rest of the family.

But the deed goes much farther by creating or attempting to create a sort of tailzie, under the name of a trust of a very anomalous kind, to have endurance, if not for perpetuity, at least so long as any descendants of the six children of the granter shall exist, which may be for many generations, and perhaps for ever, and including an infinite number of persons.

It is this object of the deed, and all the clauses relative thereto, that are not only whimsical, irrational, and singular in their nature, but in a great degree absurd, inconsistent, and inextricable. In the very outset it is said that the granter means to preserve and secure his estate for the support and subsistence of his descendants in all time coming, and it is plain that he meant to settle the succession upon his descendants, whether of the male or female line; but inadvertently he disinherits his daughters, and calls in, failing the heirs male of his son's body, his own collateral heirs male, in prejudice of his whole female descendants, even the daughters of his son and their issue; and their collateral heirs male, upon succeeding, will be entitled to the provision made for them. It may be true that he meant by the words "my own heir male" to call only the heirs male of his body; but this limitation cannot be supplied, as the Court found in the late case of *Miss Hay v. Hay of Drumelzier*, concerning the estate of *Limplum*.

The appointing each succeeding heir to be a trustee, and to be liable in a certain distribution among the descendants progressively at their age of twenty-five in all time coming, with certain weekly allowances and apprentice fees in different events, the heir himself being factor, with an allowance for factor fee, to keep books, hold quarterly meetings, render accounts, and to submit questions and disputes to certain official arbiters, would, if sanctioned by a judgment of this Court, lay the foundation of a new species of entail not hitherto recognised in the law of Scotland, and therefore of dangerous example, besides being wild and extravagant in its nature.

The principles which regulate tailzied fees in Scotland are well known, and are fully discussed in the case of *Cassillis*. They are different from those of an English entail; for with us the whole fee is in each succeeding heir, but subject to restraints and limitations arising from the clauses prohibitory, irritant, and resolute, which give a *jus crediti* to the subsequent heirs, entitling them to challenge deeds of contravention, and which, by the act 1685, are effectual against third parties when duly registered in a certain form.

Trust settlements are likewise usual with us, and admit of being easily extricated when granted for certain reasonable and temporary purposes, such as payments of debts, and securing provisions to wives and children. In the late case of *Lord Hyndford's settlements* the Court went as far as possible to sustain a trust-deed where the purposes went

March 23, 1831. of Strathmore chose to execute a deed, the object of which was to defeat all succession in the person of his nearest legitimate relation, and to whom his titles must descend. The Earl, with the prospect

a little beyond what has usually been thought reasonable and consistent with the powers of a proprietor with regard to the disposal of his estate after his death; but lawyers differed with regard to the validity of that deed, though temporary in its nature, and calculated for purposes which, in the case of a noble family, were not thought inexpedient or unwise.

Even in that case, however, third parties were named as trustees, and the non-acceptance of these trustees was not thought a sufficient reason for defeating the deed, because this Court might have appointed other trustees to follow out the lawful purposes of such a trust.

Where an estate is given to a corporation, or to an hospital or charity, the management can only be in trustees or administrators; but in such a case the property or substantial right is in the corporation or community to which it belongs, and the case would be just the same if the estate were purchased, the corporation being a *person* in the eye of law which can hold property, but the management necessarily conferred upon trustees or factors acting for the real owner.

The case of a perpetual trust in the individual owner of an estate, himself and his heirs for ever succeeding to that estate, declaring the right to be vested in them indefeasibly for certain ends and purposes, is a novelty both in law and practice. The mere name of a trust cannot tie up their hands, for if they succeed to the fee of the estate they must have the power of disposal, unless in so far as they are limited by clauses prohibitory, irritant, and resolute, in the usual form, and having the usual effect of an entail by the law of Scotland, or come under an obligation that it is actionable. Thus, if I should settle my estate upon my eldest son and the heirs of his body, whom failing, my second son and the heirs of his body, &c., declaring the same to be a trust in my said eldest son and the heirs of his body, and each of the succeeding heirs for themselves and the heirs called after them, without tying them up by clauses prohibitory, irritant, and resolute, it is thought that this would be neither more nor less than a simple destination.

In the answers it is said, the object of this deed was to secure the capital of the granter's fortune to his children and their descendants, and that this trust should be perpetual. What is this but an entail in a new form, viz. that of a trust vested in the heirs themselves for behoof of themselves and those interested in the succession, i. e. among whom the rents or produce are to be divided in all time coming, not for the preservation of the family by having one representative succeeding another in a certain order, and enjoying successively the whole benefit of the estate, but by a partition of the rents among all the members of the family, and still carrying on the succession to the remotest generation, whereby perhaps in time they would not have a shilling or a penny each person.

But, further, when the deed and codicil are attended to, this very object, which is held out as the sole purpose of the deed, seems to be entirely frustrated by the clause in the printed codicil, compared with the deed.

Perhaps the granter meant that the yearly produce only should be lent out as directed; yet the stock mentioned, and which, failing descendants, was to go to the hospital, seems to be the whole residue, whether consisting of capital or interest.

Perhaps, too, the dividends were only meant to reach the yearly produce and interest after satisfying other purposes; yet, when explained by the words which go before and those which follow after, it seems difficult to give it this limited construction; so that at the end of every seven years all the subjects on hand, after satisfying the

before his eyes of speedily going to his great account, appears to have had two objects in view ; one to spite his brother, and the other to evade the laws of his country. Your Lordships have been called on more than once to consider the means by which he endeavoured to give legitimacy to his natural son through a marriage solemnized for the purpose of bringing the principle of the Scotch law — the Roman law of legitimation — to bear upon the status of an aforeborn child. That attempt of the Earl your Lordships frustrated ; but this attempt of the Earl, I am afraid, must be supported. I cannot but grieve to say it, and I would that it could be defeated. I would that the law of Scotland had been made the same as the law of this country, and that a positive and distinct legal enactment had specifically laid down within what period accumulations should go on, which take land out of the proper enjoyment, and which take personal property out of trade ; but I am compelled to admit that the legislature has not thought fit to make any provision to limit that power in Scotland, but rather, as I think I shall shew your Lordships, has assumed that the restraint does not exist.

In humbly giving the advice I am about to offer your Lordships to confirm this decree, after what I have said, I shall not be

annuities and other provisions then actually paid or payable to persons existing, are made the subject of immediate distribution ; and if in a year or two thereafter so many more claimants should exist, there would be no fund for them till some of the preceding annuitants should die out, or a proportional defalcation would take place ; or even if we should suppose that these septennial dividends were to be confined to the interest, leaving the capital entire, still each payment of £50 would encroach upon the capital if there was no sufficient fund on hand arising out of the interest ; and in this way the intended perpetuity would be frustrated, and the deed rendered inconsistent with itself. If this settlement can be supported upon any ground, it must be upon the footing of the heir having come under an obligation by acceptance of the deed, and possessing under it, to pay these eventual provisions ; at same time this will not tie up his hands from selling, &c. ; neither can he be obliged to find caution to make them effectual.

Hailes.—Interlocutor goes too far in supporting this deed in whole—deed cannot subsist for ever—intended for a perpetuity, in same way as entail, but an entail comes to an end—would be for finding that the payments must be made *without defalcation*.

Swinton.—Not an entail, and no instance of such a settlement being sustained. Suppose an estate ordered to be divided into square yards.

Estgrove.—No ground for setting it aside. If he may choose stranger heirs, why not his heirs ? besides, this pursuer bound.

Justice Clerk.—Great rule is, that the will of the defunct must have effect. If it becomes inextricable it will reduce itself. We cannot divide the deed. Cannot the absurd clauses be set aside, *e. g.* suppose they were immoral, impossible, &c. ?

Henderland.—Testam. factio juris gentium here not inextricable, at present may be supported *hoc statu*.

March 23, 1831. suspected by your Lordships of harbouring any great wish to see the late Earl's purpose carried into effect; but the law is such, and we cannot help it — we must decide according to the law, and not according to our own inclinations. Now the facts of this case are clear; there is an accumulation for thirty years from the day of his death, and after the death of the longest liver of the two Lyons, who were then from fifteen to eighteen or twenty; so that it could not be an accumulation of less than thirty years; and the question is simply, Whether, by the law of Scotland, when no statutory provision has been made (except what I shall by and by mention), this is a valid disposition of the property? By the will of Mr. Thelluson, he had intended, from motives of family pride, to accumulate property to an immense amount. It was calculated that the fund might probably reach 100 millions before it could be enjoyed; and it was said that in thirty years, which was the lowest period you could then look forward to, it would amount to eighteen or nineteen millions. Alas! the calculations of those who thus commented on that will were as vain as the wishes of the testator himself; for it is a fact worth mentioning, to show the value of such perspective views of accumulation, that the Court of Chancery having got possession of the property, this great accumulation, instead of nineteen millions, now is under 500,000*l*.! It is thirty-three years since; and what was an estate of near 20,000*l*. a year at the death of Mr. Thelluson is, I believe, little more than 22,000*l*. at the present time; so well have they provided in Chancery for the prevention of an accumulation, which was matter of alarm at the time, as threatening to upset the constitution. Effectual means have, it should seem, been found to moderate the rate of accumulation, so as to make it harmless enough to the state. That case was decided in favour of the will, after much learned argument by most able judges — Lord Loughborough, assisted by the Master of the Rolls, Lord Alvanley, and by Mr. Justice Buller, and Mr. Justice Lawrence. My Lord Loughborough thereupon brought in the act by which the power of accumulation in England is restrained to the death of the testator, and twenty-one years after, upon the principle on which our law of real property, as to perpetuity, proceeds; and then there follows this clause with respect to Scotland:—‘Provided also, that nothing in this act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.’ Now, it is contended on the one side that this assumes that there was in Scotland, without the act, a sufficient limitation of perpetuities and accumulation; and that the act as to heritable property was not extended to Scotland, because it was not wanted in Scotland. On the other side (and it appears to me, if it

March 23, 1831.

went no further, that this is the better argument of the two,) it may be said that the act expressly excludes Scotland, because it proceeded on a principle known to the law of England; namely, the recognition of the period of twenty-one years, and a little more, after lives in being, beyond which restraint of property is not allowed, for fear of creating perpetuities. But in Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being, and twenty-one years, with the time of gestation beyond, permits you in every case to tie up property for ever and ever, as may happen in one case in England, that of the reversion being in the Crown, and in that case only. The adaptation of the limitation was therefore intelligible and rational in England, but would have been inconsistent with the principle of the Scotch law, and therefore it was not extended to Scotland. There is another observation which appears to be decisive. Real and personal property stand precisely on the same footing in Scotland. If the law restrains perpetuities in Scotland as to real property, it restrains perpetuities in Scotland as to the accumulation of personal; that cannot be denied. Now, this act leaves heritable property as it stood by the common law, but extends to Scotland quoad personality accumulation. If so, does it not follow that this act assumes that there is no restraint in Scotland? because if there was at common law a restraint as to heritable property, it is contrary to any thing that has been argued on either side of the bar that personal property would not also be restrained; and, consequently, this act would not have been wanting to extend to personal property in Scotland. Yet it does extend to personal property there, and is expressly precluded from extending to heritable property. It is not, however, perhaps quite correct to draw inferences of this sort from an act of parliament, when you consider that the legislature is always to have the same fairness and candour dealt out to it that a court of justice has in giving an obiter opinion in deciding on a particular point of a case. When the lawgiver lays down a particular rule upon the subject which he is dealing with—upon the principal point in the act, if I may so speak, by analogy to judicial decisions, there is no doubt of the intention, and he must be obeyed; so if he declares the law, reciting, whereas the law in such a case is doubtful, I declare that it is so and so;—that makes the law. But your Lordships are aware, that although the preamble to an act of parliament expressly affixed a certain construction to another act of parliament, the Courts have passed by that referring preamble altogether, although they were much pressed by the argument which, at first sight, appears a rational one—who so good a judge of what he means in

March 23, 1831, the former act as the lawgiver who is passing a new one? Although the lawgiver expressly said, I formerly passed an act, and meant so and so by it; yet that was rejected in the Courts of Westminster Hall, by a decision which has ever since been held to be the rule in such cases. They considered that the construction of one act is not to be taken from an assumption in the preamble of another made upon a different matter, and not expressly declaring by enactment; and I should say, that the same principle applies, in a certain degree, to such doctrines as have been broached here. You ought not, when the legislature does not lay down a distinct rule, by enactment or declaratory clause, rashly to imply, from what it has not said, any meaning as to what is or what is not the law in other respects.

Now then we come to the grounds on which it is argued that the Scotch law is against the validity of these deeds. I think it clear, in the first place, that the pursuer had a title to pursue; that indeed has scarcely been disputed at the bar here. I take it to be clear, in the next place, that you must construe these different deeds together, and as parts of one conveyance. It will be less necessary to dwell much upon this second point; because I am of opinion the Court below have come to the right judgment in saying this is not, by the law of Scotland, such a perpetuity as a man may not create with regard to real property of which he is the unlimited fiar. Now there is no dictum of any text-writer on either side. There is also no decision on all-fours with the present case; those decisions on which the appellants rely appear to me not applicable to this question. Much doubt is raised on the Barholm case. I do not deny that it was well decided, and that there have been subsequent decisions in which it has been so far referred to that we cannot regard it as a case which has slept in the books, or been repudiated as against principle, or fallen into a kind of nullity from not having received the sanction of the profession, like *Fitzroy v. Gwillim*, and one or two other cases admitted not to be law in Westminster Hall, though never directly over-ruled. But the question is,—does the Barholm case apply to this? And when I look to the decision there, I find the report of it by Lord Elchies as follows: "This was a question of reducing two most ridiculous entails and trust-rights, whereby, excepting small aliments to the heir, the rents were to be applied for many years in purchasing other estates, and entailing them in the same manner. We all agreed to reduce the whole deeds, remitting to the Ordinary to allow the pursuer to prove the reason of death-bed against the last deed. I inclined to give that proof first, though I agreed in opinion as to the other reasons; but the Court did as above." But on looking into the papers, there appears clearly to

March 23, 1831.

have been something in the nature of a perpetuity,—it was not twenty-one years,—it might be sixty years; and accordingly, in one part of the argument, they contended that it must be sixty years. I do not go along with the argument to that extent, because I think it might have been less. But there are provisions again and again for unborn children; and to show it does not merely deal with persons in existence, and to give them a vested interest in possession of the accumulated fund at some period of a life in being, it says, if only five children should come into existence, or shall be in existence, then five years' rent shall be taken; but if more than five, then four shall be taken; and, accordingly, the calculation is made on twelve, which would be forty-eight; and then that would be a fund to accumulate, and to accumulate in order to be dealt with after those children came into existence; and when they shall attain the age of majority, that is, twenty-one years after the last of the twelve children; and the accumulation does not cease until after the birth of the last of the twelve children; but the last of the twelve children might be born twenty-one years (they were all grand-children of this person) after the death of the person; there is forty-two years at once; it might have been forty years after the last, or thirty years after the last, and there would have been fifty-one; and therefore it is in vain to talk of this being twenty-five years. As I read the deed, there is an accumulating fund for twenty-five years, not to come into possession at the end of that time, but it might be many years afterwards. But, my Lords, I ought to state, that in reading this deed, I feel the greatest doubt, from its being an absurd, and, as the Court called it, a contradictory and unintelligible disposition of property, whether I have come to the right construction of it; for instance, the testator says the second son shall succeed, or, failing of a second son, the second daughter, as if the eldest daughter and the eldest son were out of the field; and yet you plainly see, from the other parts of the deed, he does not mean that, but something different; it is indeed not easy to see what he precisely means. This is a case where Courts of law are called on to put a construction upon a will, and endeavour to find out a meaning for a man who had no distinct or intelligible meaning himself; so that the Court may be said rather to make a will than to construe one; and this tends to bring some obloquy on the law. Thus the decision in the Barholm case very possibly might have been different, if the Court had seen a plain, consistent, and distinct intention on the part of the maker of those deeds, such as they plainly, clearly, and consistently perceive to have existed in the mind of the maker of Lord Strathmore's deeds; and if I were satisfied it was only an accumulation for twenty-five years in the Barholm case, which I am not at all satisfied

March 23, 1831. of, but the contrary, or if I were satisfied what was the meaning of the party, (which I cannot be with any certainty,) the case might be of some weight as an authority ; but when I find the settlement there mixed up with such a mass of clauses impossible to be construed, that very nonsense of itself constitutes a material speciality, and prevents the case from applying as an authority to another case, where no such speciality exists, but where a clear, consistent, and intelligible sense is seen operating from the beginning to the end of a very short and simple conveyance. Whatever bad qualities may be found in Lord Strathmore's disposition, no man can accuse it of being either unintelligible, inconsistent, or confused.

There are other cases which your Lordships have been referred to, and among these that of Hyndford ; but M'Nair v. M'Nair, and the authority of Sir Ilay Campbell, have been much pressed on the attention of the House. Here is Sir Ilay's argument in that case : " A settlement, in the form of a perpetual trust, upon the " heirs themselves, is a novelty in the law of Scotland, neither " agreeable to any principle of common law, nor deriving any support from the act of 1685. The Court went far enough in the " case of Lord Hyndford, where a temporary trust for special purposes was supported ; and in that case the trust was not vested in " the heir himself, but in third parties." In this case of M'Nair, it is quite clear they speak of a perpetuity in terms, yet it is evidently taken for granted in this codicil that the stock is to remain. Certain sums are ordered to be paid to the male and female descendants at the age of twenty-five ; and now they say, that this is so irrational and whimsical as to be ultra vires of any proprietor, because the fund might not vest in any proprietor until the expiration of so many years as would come within the description of a perpetuity. It is either a perpetuity—in which case the decision does not apply at all—or it is not a perpetuity. Now, let us look at the decisions :—First, the Hyndford case is distinctly stated by Lord President Campbell to be for a limited number of years, and to have been sustained. What do they say in this case of M'Nair and M'Nair ? Lord Monboddo, a great authority, says, " The deed is legal, and " ought to be sustained." Lord Swinton is for setting it aside, on the ground, that " when a man ceases to live he cannot hold his " property." Now, really, my Lords, if a learned Judge is represented as stating such a reason as this, which is contrary to all law, that a man is to have no power of disposing of his property, real or personal, after his decease, what possible conclusion can we come to, except either that the learned Judge never said so, and that therefore we have no right to know he was for setting the deed aside, or, that the learned Judge, on this occasion, did not exercise

his usual acuteness and discrimination. True, a man cannot hold it, March 23, 1831.
but he may deal with it. His Lordship continues : " It is civil law,
" and not the law of nature, that allows testamenti factio and substi-
" tution ; but still the heir, when he succeeds, may do as he pleases."
To be sure ; but the question is, When is he to succeed ; and to
what period is the succession to be postponed ? " This case is not a
" tailzie within the act of parliament." That is, " You are trying
" to do per indirectum what the law will not allow (and there every
" one must go along with his Lordship) ; you must not get rid of the
" act by a sidewind ; you must either make it an entail or not. If
" it is not an entail, it has no protection ; if it is a tailzie, it must
" have the fencing clause and registration." Then observes the
Justice Clerk, (one of the greatest lawyers that ever sat on the
Bench in Scotland, and one of the clearest-headed men, and of the
most masculine understanding, I had ever the good fortune to hear
argue,) " To overturn wills of defuncts upon ideas of rationality is
" very delicate. If it be unlawful, it ought to be set aside, but
" not otherwise, if it be at all extricable. If it is unintelligible
" and confused, then it is set aside, not as a perpetuity, but be-
" cause you cannot make sense of it ; so was the case of Barholm,
" perhaps to a certain degree. It has lasted already twelve years,
" and may continue until it becomes inextricable. Entails were in-
" troduced long before the act of parliament." I say that the result
of this is, that the Lord Justice Clerk was against setting aside the
deed. It is not very distinctly given. The President was for setting
aside the deed, but he considered it a perpetuity. Lord Eskgrove
had an inclination to set it aside, but he hesitated at present, the
suit being at the instance of the heir who represented the granter ;
Lord Dunsinane and Lord Henderland the same—so they did not
give a decision on the subject ; and Lord Alva, a judge of little
authority, was for setting the deed aside. Then comes the Lord
President Campbell's second argument. He goes over the ground,
that it went to create a perpetual trust in the heirs called to the suc-
cession, for behoof, not only of themselves, but of the descendants
of the granter, to the end of time, so long as any should exist ; and
yet, notwithstanding this, you see three judges—among them one
of great learning—are of opinion that the deed should stand, and
three do not decide the reverse ; yet this is a perpetuity, and how
then can we say the law of Scotland abhors perpetuities ? " The
" deed," says his Lordship, " goes much farther, by creating, or at-
" tempting to create, a sort of tailzie, under the name of a trust of a
" very anomalous kind, to have endurance, if not for perpetuity, at
" least so long as any descendants of the six children of the granter
" shall exist, which may be for many generations, and perhaps for

March 23, 1831. "ever; and including an infinite number of persons." That is Lord President Campbell's statement of this case, which goes to a perpetuity. Lord Hailes—"The interlocutor goes too far in supporting this deed in whole: it cannot subsist for ever." Lord Swinton—"It is not an entail, and no instance of such a settlement being sustained,—suppose an estate ordered to be divided into square yards." Lord Eskgrove, an eminent lawyer—a man of most luminous understanding upon all legal points—says, "No ground for setting it aside; if he may choose stranger heirs, why not his heirs? besides, this pursuer is bound." Justice Clerk—"The great rule is, that the will of the defunct must have effect; if it becomes inextricable it will reduce itself. We cannot divide the deed. Cannot the absurd clauses be set aside; for example, suppose they were immoral or impossible?" He does not say they were. Lord Henderland—"Testamenti factio est juris gentium; here it is not inextricable at present, and may be supported *hoc statu*." As far as this goes, it is in favour of the deed. "In the late case of Lord Hyndford's settlement, the Court went as far as possible to sustain a trust-deed, where the purposes went a little beyond what has usually been thought reasonable and consistent with the powers of a proprietor, with regard to the disposal of his estate after his death; but lawyers differed with regard to the validity of that deed, though temporary in its nature, and calculated for purposes which, in the case of a noble family, were not thought inexpedient or unwise." That is all for supporting the deed. "The case of a perpetual trust," says Lord President Campbell, "in the individual owner of an estate, himself and his heirs for ever succeeding to that estate, declaring the right to be vested in them indefeasably for certain ends and purposes, is a novelty both in law and practice. The mere name of a trust cannot tie up their hands; for if they succeed to the fee of the estate, they must have the power of disposal, unless in so far as they are limited by clauses prohibitory, irritant, and resolute, in the usual form, and having the usual effect of an entail by the law of Scotland, or come under an obligation that is actionable." Now, my Lords, I ask whether any one can doubt that Lord President Campbell's opinion only goes against a perpetuity being created? and in that opinion he is not supported by his brethren; but he also says: "I am not against this because it is an entail—it is either an entail or nothing—if it is not an entail it is unknown in law—a novelty—an anomaly in the law; and if it is an entail, where are the fencing clauses, and where is the registration?" Then, on that ground simply he puts it.

I have looked into the papers in the Hyndford case, and they raise

the impression that the trust was to endure for a longer period of time than by possibility this could. That was not a deed for twenty-five years, except in one event—in the event of one of two alternatives happening; but nevertheless that deed was supported, if I am to take the statement of Lord President Campbell. He says it may be supported, so far as it was temporary, for special purposes; and what possibly may reconcile the books on the subject is, that it was supported as far as regards the temporary part, and set aside only as regards the perpetuity. Here it is not contended that the perpetuity should be supported, nor is that contention necessary to support the judgment of the Court below. I do not mean to say that there may not be an extremely good ground for setting aside an accumulation which is to go on for ever, and I do not consider that we are bound to say how long or how short a period money or land may accumulate in Scotland. We are not called on to decide that at the present time, or to draw a line, the want of which, as to leasing, was so much felt in the cases from *Turner and Turner* down to the *Roxburgh* case, which finally fixed the period on somewhat of an arbitrary ground, not perhaps well adapted to the Scotch law, yet now acceded to by the Scotch lawyers, who at first thought it was an importation of English law into the Scotch law of tailzies. I must say, —adverting to the difficulty felt in these cases, and to the others connected with the present question, that it would be very desirable to have the rule fixed by positive statute in Scotland, as Lord Loughborough's act did in England. With this observation I shall conclude what I have to offer on this case. I have entered into it at greater length than I should otherwise have done, rather on account of the importance of the question to the parties than of any doubt upon the decision fit to be given upon it. I was prepared to give the same opinion to your Lordships after hearing the appellant's counsel; but as they complained that they had been dismissed rather hastily in the Court below, it seemed better that the argument should be gone through, and that the appellant (whose case is a very hard one) should have the opportunity of replying, new lights being sometimes struck out in a reply. But from the first I entertained no doubt at all that the principle of the decision come to in the Court below was right.

Mr. Attorney-General. — I apprehend this is a case in which your Lordships will think the trust-property should bear the costs.

LORD CHANCELLOR. — I shall propose that reasonable and ordinary costs on both sides should be paid out of the estate. I never saw a clearer case for so doing. This appellant was entitled to have this question thoroughly discussed, and to that extent there is no reason whatever to spare the estate; but if I find the expense

March 23, 1891. of special retainers has been incurred in bringing up counsel to argue a plain case, I shall protect the estate from such a squandering away of money.

The House of Lords found, That the appellant had a title to pursue this action; and with this finding it is ordered and adjudged, That the interlocutor complained of be affirmed; and it is further ordered and adjudged, That the cause be remitted back to the Court of Session, with instructions to that Court to direct the reasonable costs incurred by both parties relative to this cause to be paid out of the trust-estate; and to do further in the said cause as to the Court shall seem fit, and as shall be consistent with this judgment.

Appellant's Authorities.—1685, c. 22; 39 & 40 Geo. III. c. 98; Randall on Trusts, pp. 46 and 88; M'Neill, January 27, 1826 (4 Shaw and Dun. No. 266); Ker, January 23, 1747 (12,987); Earl of Wemyss, November 17, 1815 (F.C.); Mordaunt, March 9, 1819 (F.C.); M'Culloch, November 28, 1752 (ante) and Elchies voce Tailzie, No. 48; Thelluson's Case, and authorities quoted, 4 Vesey, 227; affirmed, 11 Vesey, 112; 2 Blackstone, c. 1, p. 10; 2 Hen. Antiq. tit. x.; Kames, His. Tr. p. 134; 1 Bell's Com. 38; Elchies, voce Tail. No. 48; Crawford, Nov. 17, 1795 (14,958), and H. of L., March 14, 1806; Hill, April 14, 1826, (2 Wilson and Shaw, No. 11); Crichton, May 12, 1826 (3 Wilson and Shaw, No. 17).

Respondents' Authorities.—3 Ersk. 8, 98; Rowan, Nov. 22, 1775 (11,371); 2 Bligh, p. 619, 655; Moir, March 2, 1820 (F.C.); Batley, Feb. 2, 1815 (F.C.); Thelluson's case, 4 Vesey, 227; affirmed, 11 Vesey, 112; 3 Hargrave, Juris. Exer. p. 138; M'Nair (Bell's Cases, 546).

VIZARD and Co.—SPOTTISWOOD & ROBERTSON,—Solicitors.

Right Hon. LADY MARY MONTGOMERIE, &c., Appellants.— No. 15.
Tinney—Robertson.

RUNDELL, BRIDGE, and RUNDELL, &c., Respondents. —
Lushington—Kaye—et e contra.

Annual Rent.—Where a lady, as executrix qua relict, gratuitously undertook “the gradual payment and extinction” of the debts of her deceased husband, “by making payment and satisfaction” thereof out of her estate, chiefly by annual payments, contemplated to be effected in five years, and after a term of years paid off the greater part of these debts, and in the interim made successive partial payments and adjustments of interest with some of the creditors to a considerable extent, but never paid any interest, arising subsequent to her husband’s death, to a certain class of English creditors under bonds or bills; and the House of Lords having found, in a question with the creditors, that the estate was liable for the debts till “paid and extinguished,”—Held (affirming the judgment of the Court of Session), that the estate was liable to the creditors for the interest accruing on her husband’s debts while unpaid, although it had cost her a much greater sacrifice of property to pay off the principal than she had any reason to expect at the date of granting the gratuitous obligation.

THE House of Lords having, in the leading question between these parties, (ante Vol. I. No. 14, where a full detail of the facts is given,) reversed, on the 15th April 1825, the judgment of the Court of Session, and found, “That under the commission bearing date the 16th day of July 1814, and the deed of obligation and assignation, bearing date the 10th day of October 1814, the said Commissioners are bound to apply the rents of the estates mentioned therein, after making payment of the sum therein mentioned to Lady Montgomerie, and of the other sums and expenses therein provided for, in discharge of the debts due from the late Lord Montgomerie, until thereby, and with the other funds mentioned in the foregoing instruments, the same debts shall be paid and extinguished. It is therefore ordered and adjudged, that so much of the said interlocutors complained of in the said appeal as is inconsistent with the above finding be and the same is hereby reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be consistent with this judgment, and as shall be just.”

March 25, 1831.

1ST DIVISION.
 Inner House.

Under a petition to apply the judgment, the creditors, besides payment of the principal, claimed interest on their debts, constituted or unconstituted, from the date of the arrangement. Lady Montgomerie, in order to obtain the unlimited administration of

March 25, 1891. her estate, although only bound to a slow and gradual extinction of the debt, raised money and paid off the whole (with some minor exceptions), amounting to above £100,000; but the question of liability for interest remained in dispute.

Much discussion occurred in the Court of Session, whether the payment of interest had been contemplated by the creditors or by Lady Montgomerie. The evidence on this point was very loose and inconclusive. In a number of cases interest had been paid to Scotch creditors rather peculiarly situated, but the English creditors had not been paid interest; neither did a report by an accountant, whether the calculations, on which Lady Montgomerie brought forward her original offer to the creditors, included interest upon the debts subsequent to Lord Montgomerie's death, or only the principal, give much light, although the reporter, at the same time that he stated that he had been unable to arrive at any certain conclusion, was of opinion that interest had not been taken into calculation at all. The creditors also claimed their whole expenses, including those which had been incurred in the House of Lords. The Lord Ordinary found, " That the claimants are entitled to be ranked
" upon the fund in medio for the interest due to them upon such
" debts as were constituted by bonds or bills; but that the claim-
" ants, who are all English creditors, are not entitled to interest
" upon the debts due to them by open account, which, it is
" admitted, do not bear interest by the law of England: Finds
" it admitted that the claimants have received payment of the
" principal sums due to them respectively in terms of the inte-
" rim decree obtained by them on the 31st of May 1826;
" therefore, in this multiplepinding ranks and prefers the fol-
" lowing claimants, viz. Rundell, Bridge, and Rundell, &c. all
" of London, upon the fund in medio, for the interest upon the
" principal sums which were due to them respectively, as speci-
" fied in the first article of this condescendence, until the said
" principal sums were either consigned by Lady Montgomerie
" in the Bank of the British Linen Company, or paid directly
" by her ladyship to the claimants themselves, under deduction
" of property tax while the same continued, and also of any
" sums paid to account of said interest, and decerns in the pre-
" ference accordingly; reserving to the claimants who have been
" found entitled to interest to be heard upon the claims which
" they make for the difference between the interest allowed by

“ the Bank upon the sums consigned, and the full legal interest March 25, 1831.
“ thereof from the date of consignment to the dates respectively
“ on which the principal sums were uplifted and paid to each,
“ and to all concerned their objections thereto, as accords; repels
“ the claim for interest made by the following claimants on the
“ sums due to them by open account, as specified in the second
“ article of this condescendence, Rundell, Bridge, and Rundell,
“ &c. all of London, and dismisses the claims for interest made
“ by these several claimants accordingly, and decerns; and in
“ respect to a motion made by the claimants for expenses, finds
“ it competent to award to them the expenses incurred by them
“ in this Court before as well as since the appeal to the House of
“ Lords; but finds that, in the circumstances of the case, the
“ claimants are not entitled to the expenses incurred by them in
“ the Court previous to the appeal; finds Lady Montgomerie
“ and her husband Sir Charles Lamb liable to the claimants in
“ the expenses incurred by them from and since the 13th of May
“ 1825, being the date of the interlocutor applying the judg-
“ ment of the House of Lords, appoints an account thereof to be
“ given in,” &c.; but the Court recalled the findings as to the
expenses, quoad ultra adhered, and found no expenses due to
either party.*

Lady Montgomerie appealed on the merits; Rundell and Co. appealed as to expenses.

Lady Montgomerie.—It is not disputed that by the law of Scotland interest is due upon almost every debt, and the exceptions only confirm the general rule. Neither is it pretended that, as administering qua relict, or in executing the agreement which she gratuitously volunteered, there has been any negligence or mora on the appellant's part. The question is merely, whether, by the deed of agreement, obligation, &c., with her husband's creditors, she came under any obligation to pay interest on the debts which she assumed. Separately, and in combination, these documents show that she did not. Demanding payment of the full debt, and not merely the amount that five years' accumulation could raise, (knowing, as the creditors did, that the payment of the full debt, whether the accumulations reached that amount or not, never was in the contemplation of

* 8 Shaw and Dunlop, No. 136.

March 25, 1831. parties,) was a sufficient extension of the original terms ; but the payment of interest never for a moment was expected. Such being the real evidence in the case, there is no room for presuming an obligation to pay interest, but the contrary ; levatio obligatio semper presumitur, and particularly in regard to gratuitous obligations. Indeed, the whole *res gestæ* of the case, and the tenor and terms of the various documents that have given rise to this discussion, abundantly show that the present claim is an after thought of the creditors, suggested by their unexpected good fortune in the former appeal. There is nothing in the judgment of the House of Lords that implies obligation to pay interest. The judgment there merely found that the obligation to pay the principal was absolute, and not limited to five years ; and, indeed, equality among the creditors being the basis of the appellant's agreement, how can payment of interest form an elementary part of it, seeing it is not disputed now that open account creditors have no claim to interest ? Besides, the language of the judgment of the House — “ in discharge of the debts due, &c., ” “ until the said debts be paid and extinguished, ” — is exclusive of the creditor's claim, for interest is not a debt. Under a commission of bankrupt no interest is proveable but what is interest arising by contract, otherwise it is only matter of damages. When the interest is part of the contract it is no doubt as much a debt as the principal, but where it is not part of the contract it is not a debt at all ; it is mere damage which must be liquidated, and sought in an action. This is undoubtedly the law of England ; and the present question, involving English debts, contracted in England, sued for by English creditors, must be treated as English debts, and the agreement, which is the foundation of the whole, be construed as an English agreement, and the support given to it such as it would have received in an English court of equity.

Lord Chancellor.—Yes. What you state as to interest has been long fixed by the case of *ex parte Marlborough*, but it does not apply to the case of a bond ; you do not there exclude the penalty.

Tinney.—Still the respondent is trammelled by the legal meaning of the word “ debt.” Here there are many creditors founding on bills and promissory notes ; (we have nothing to do with the open accounts ;—there is no pretence that interest is due on them ;) now interest on bills and promissory notes is not a debt. If it were a debt it would be the ground of a petitioning creditor's debt in a commission of bankrupt, but it is incontestible

that it is not ; and how can English creditors, on English con- March 25, 1831.
tractions and English obligations, free themselves of the rules of English law ? As to expenses, there were no grounds for giving to the creditors expenses since the remit, and it would have been incompetent to give any other.

Rundells, &c.—By the judgment of the House of Lords the appellant is bound to pay and extinguish the debts due by her husband to the respondents. The debts themselves are not disputed ; they are constituted by bond or bill ; but on debts so constituted interest accrues either *ex contractu* or *ex lege*, and in either view the appellant is liable. When soundly construed, the agreement and other writings which passed between the parties plainly imply that the debt, both principal and interest, was to be extinguished ; but even had there been no such agreement there is nothing to take the case from the operation of the common law. Besides, the appellant has been utterly unsuccessful in explaining her conduct in paying some creditors interest, if the obligation had been merely to pay principal. No distinction was taken in the House of Lords between principal and interest, or rather, the terms of their Lordships' judgment necessarily imply that both constituted the debt, and *per expressum* the debt is ordained to be paid. That interest is not debt, and as the judgment of the House of Lords ordains the "debt," without saying any thing else, to be extinguished, therefore interest is not included, is a mere subtlety. It may be quite true that in a commission of bankrupt in England, in cases not excepted by statute or otherwise, interest on debt is not proveable ; but it is a most illogical conclusion, that therefore a debt undertaken by a Scotch person and by Scotch instruments, and ordained to be extinguished by a judgment of the House of Lords, sitting as a Scotch Court and deciding in a Scotch suit, is not to be considered to include what in almost the universal case is in Scotland regarded as its natural concomitant. Besides, this argument is bottomed on an act of parliament, which, neither in principle nor detail, is known in Scotland. As to expenses, the Court ought, under the circumstances of the case, to have awarded the respondents the whole expenses, both before and after the remit from the Lords.

LORD CHANCELLOR.—My Lords, in this case, which is one of considerable importance, I will state shortly the grounds on which

March 25, 1831. I deem it my duty to advise your Lordships to affirm the judgment appealed from on both points. The questions arise out of these facts :—Lady Montgomerie, on the death of her husband, came forward, and placed her estates under a course of management, restricting herself to a very moderate share, specially for the purpose of discharging a pious duty to the memory of her husband by the payment of his large debts. The first question is, Whether that deed shall be so construed as to impose upon her the obligation of paying the interest on certain debts allowed by the interlocutor, as well as the principal, which was disallowed by the first judgment of the Court of Session, and was afterwards imposed upon Lady Montgomerie? If the first case, which was decided some years ago in this House, reversing the former judgment of the Court below, still stood for the decision of your Lordships, I should have felt some of that doubt and difficulty with which the Court below appears to have been pressed on behalf of Lady Montgomerie. The decision of your Lordships called upon the Court below to adopt the view of the case taken here, but it does not appear to have materially altered the opinion of the learned judges whose decision it reversed. Lady Montgomerie's obligations were of a nature which, when taken altogether, were calculated to raise a fair doubt how far she had bound herself beyond the strict terms of the arrangement made. Nevertheless, I think, upon the whole, the balance of my opinion would have been in favour of the judgment which your Lordships were advised to pronounce by a late noble and learned friend of mine, the late Lord Gifford, whose loss to this House, as well as to Westminster Hall, there is every reason to lament ; for the words of the deed are very strong, and certainly admit an unlimited construction of the obligation. The minute says, the remainder of the rents of her Ladyship's estates, beyond a certain sum, are “ to be applied towards the extinction of the “ balance of the debt. It is calculated that the debts may, in this “ way, be all discharged in the course of five years, including the “ expenses necessary for carrying the arrangement into execution.” Then come a commission, deed of obligation, and assignation — all of which, being parts of the same transaction, are to be considered as parts of the same instrument for the purpose of effecting the object contemplated ; and we find that the words are, after restricting herself to £5,000 a year, “ to apply the prices and produce “ of the foresaid whole subjects, heritable and moveable, together with “ the rents and produce arising from any other lands and estate em- “ tailed and unentailed ” “ towards the gradual payment and extinction “ of the foresaid debts—all as mentioned and contained, so far as the “ circumstances are at present known, in a statement and minute “ subscribed by me, of this date.” So that your Lordships see they

make a calculation only so far forth as they know the circumstances: so far forth as they can estimate the amount of the debts that is taken to be the amount; and to that amount the appellant by her obligation refers, without binding herself down to the very sum contained in the statement. The words are very material: "So far as the circumstances are at present known, in a statement and minute subscribed by me, of this date, and bearing reference hereto; providing always, that the same commissioners shall be bound to hold just count and reckoning to me for their respective transactions and intromissions in virtue hereof; and, lastly, I hereby declare that this commission shall endure and continue until the foresaid powers are accomplished, so far as concerns the payment and extinction of the foresaid debts." The word "foresaid," the reference to the balance, and the words, "so far as the circumstances are at present known," are applied to the words, "towards the extinction of the foresaid debts—an account and list of which is to be taken and made up by my said commissioners so soon as the same can be properly investigated," (so soon as the same—that is, certain expenses—can be investigated,) "until those debts are fully paid and discharged." Upon the whole, I lean to the opinion expressed in the year 1825 in this House; and that almost disposes of the present question; because, if interest is due upon these debts—upon the specialty debts—in England, and by the custom of merchants, upon promissory notes and bills of exchange, in Scotland as well as England, the question is only, Whether, the principal being disposed of in the former cause, the interest only remaining to be dealt with at the present time, that interest does not come within the scope and meaning of the obligation into which this lady, so honourably to herself, entered, and by which she engaged to pay? I am therefore of opinion that the Court below was right in giving the interest upon these particular kinds of debt. My Lords, I was greatly moved, certainly, by the argument pressed so ably upon the House by Mr. Tinney, and which was a view of the subject taken here for the first time; and I requested, upon that ground, that your Lordships would postpone the consideration till to-day, that the counsel might apply themselves to that view;—they have confined themselves strictly to it, and have, in my opinion, displaced Mr. Tinney's position, and shown that it ought not to induce your Lordships to reverse the decision. Throughout the whole of the instruments are to be found the word "debts," or some word equivalent. Then, says Mr. Tinney, the question is, Shall interest be given for those debts? This is strictly an English question; for it is by the creditors residing in England that the criterion is taken, and so laid down in Scotland. On all hands it is admitted, that the

March 25, 1881.

March 25, 1831. claim of interest on simple contract debts, which are not privileged, is to be rejected ; because, though allowed in Scotland, no interest is due upon them in England. I wish it were otherwise in England ; for, where there is a large sum,—£10,000 for instance,—the interest, amounting to £500 a-year, will bear the expense of a long litigation ; and the parties, keeping their money in their own hands, will thus be enabled to support the cause ; but such is the law. The question is, Whether, by the English law, this would be allowed ? if so, it is allowed by the Scotch Court ; and if not, it is disallowed by the Scotch Court. Now, Mr. Tinney says that the interest is not part of the debt, and cannot be proved under a commission of bankrupt ; and for that he refers to the case of *ex parte Marlar*, in 1 Atkyns, 150, and *Cameron v. Smith*, in 2 Barnewall and Alderson, 305, which is not the first case of a Court of common law proceeding on the principle sanctioned by Lord Hardwicke in *ex parte Marlar* ; for it had been referred to in the Court of Common Pleas. In those cases it is held only that you cannot add the interest to the principal, on a promissory note, to make up the hundred, or hundred and fifty, or two hundred pounds, necessary to constitute a petitioning creditor's debt, in suing out a commission of bankrupt, according as there may be one, two, or more creditors. Now, on what does this doctrine rest ? It is, that interest is not a debt in the strict legal acceptation of the word, but only damages given for the detention of that debt ; and as, at law, the debt must exist, and be a hundred pounds debt, or a hundred and fifty, or a two hundred, as the case may be, there must be a debt, and not damages for detention of that which is in strictness exclusively called debt. But the bankrupt law is the creation of statute ; its whole arrangements arise out of the express provisions of acts of parliament ; and so nice is the distinction taken in construing those acts, that the strongest equity a man can have against his debtor shall not enure to the extent of adding a farthing to make up the amount of the petitioning creditor's debt. So, a man may be bound in equity to pay me a thousand pounds, and yet I have no power of taking out a commission, unless I have a legal remedy. This is sufficient of itself to constitute a broad distinction between the case relied on by Mr. Tinney and that now at the bar ; for it is perfectly clear that the Court of Session, being a Court of equity as well as a Court of law, is bound as such to put the construction which equity requires on the word "debt" in these instruments. I think your Lordships therefore are brought back to the fair construction of the word "debt ;" for we find "the debt"—"the extinction of the debt"—"the liquidation and extinction of the debt"—is the object of this arrangement, according to the various words used in these instruments ; and if you find that there is nothing to exclude from the scope of these

expressions that which is undeniably due from Lord Montgomerie to his creditors—that which constituted the claim of his creditors against the estate of Lord Montgomerie—that which his creditors would have claimed against Lord Montgomerie's estate if that estate had been under the administration of the Court below, the question is, Whether Lady Montgomerie did by these instruments not put herself in the place of her deceased husband, under an arrangement to spread itself over a considerable period of time, a period uncertain as to its extent, but to last as long as those debts existed?—whether she did not mean to put herself into his shoes, (if I may so express myself,) as if bound by his obligation? Now, there cannot be a doubt that in these cases, both as to the specialties and as to the privileged instruments, of a mercantile nature, he would have been liable to interest as well as principal, though not recovered under the technical meaning of the word “debt;” but in an action on a debt due, it would have been recovered under a separate head; and, with that technical nicety which the law raises in this country, it would have come within the general description of his obligation, and would have been that which he was bound to pay,—the principal being strictly the debt, but the interest being equally within the scope of the obligation. It is an obligation upon her to pay that interest until the principal shall be satisfied, Mr. Tinney's argument, it is admitted, applies only to bills of exchange and promissory notes; and I find that this distinction, which I stated to him, was taken in *Cameron v. Smith*; for there the Court held that the argument did not apply to penalties in a bond.

While I feel it my duty now to offer my humble advice to your Lordships to affirm the judgment, I shall not recommend that any thing should be said against the interlocutor refusing expenses. The conduct of this lady was above all praise. She has clearly made herself liable to payments which she was little aware of at the time. It is very likely she did not intend to bind herself to the extent to which this House, reversing the first judgment below, has held her liable; and it is quite clear that the amount goes very far beyond her calculations, so that she is placed in a situation of no little hardship. Upon these grounds, also, I should not advise your Lordships to allow any costs of this appeal.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's (Lady Montgomerie) Authorities. — *Marlar*, 1 Atkyns, 150; *Cameron*, 2 Barn. & Ald. 305.

ALEXANDER MUNDELL, MONCREIFF, WEBSTER, and THOMPSON —
Solicitors.

No. 16.

FLORA MACKAY, Appellant.—*Robertson—M'Neil.*JAMES GILLESPIE DAVIDSON, and others, Trustees for Mrs. Mackinnon, Respondents.—*Lushington—Rutherford.*

Fraud and Facility—Death-bed.—Held (affirming the judgment of the Court of Session), 1. that although the grantor of a deed of settlement was proved to have been, prior and posterior to the execution of it, addicted to habits of intoxication, yet as there was no evidence (but the reverse) that she was drunk when executed, it was not reducible; and, 2. that a deed executed on 6th December was not liable to be reduced ex capite lecti, although the grantor died on the 13th, and had been in bad health, confined to bed, and frequently intoxicated, both before and after the execution of the deed; but the disease of which she died arose posterior to its execution.

March 25, 1891.

2D DIVISION.
LORD MEDWYN.

THE late Major Alexander Mackay (of whom Flora Mackay was the successor) raised an action as nearest lawful heir of Mrs. Elizabeth Campbell or Mackinnon, widow of the Rev. John M'Kinnon, concluding for reduction of a deed of settlement executed on the 6th of December 1822, by which she conveyed to the late Hugh James Rollo, W. S., her estates heritable and moveable, in trust for the purpose, inter alia, of paying a legacy of £500 to a Mrs. Macleod, another of the same amount to Mr. Rollo himself, and one of £200 to his clerk, and thereafter to convey the residue to her natural grandson. The reason of reduction (besides the ordinary one of style) was, that “the foresaid trust-deed and settlement was impetrated from the said deceased Mrs. Elizabeth Campbell or Mackinnon, without any just, necessary, or onerous cause, on the 6th day of December 1822, while she was on her death-bed, and labouring under the disease of which she died, and in a state of utter incapacity to execute any effectual deed whatever, and that the foresaid deed is to the prejudice of the pursuer as nearest and lawful heir served and retoured as aforesaid.” These allegations were denied by Mr. Rollo, who, pending the process, assumed Davidson and others as trustees, resigned the office, and renounced his legacy, with a view to qualify himself as a witness, but he died before the question as to his admissibility was settled.

A proof of the allegations in the libel having been allowed, evidence was taken in regard to these points: 1. Whether Mrs. Mackinnon was in such a state of incapacity, at the time of

execution, as to render her unable to make an effectual deed? March 25, 1831.

2. Whether she had duly authorized the deed in question? and, 3. Whether she was not on death-bed at the time of its execution?

It appeared that she was proprietrix of the estate of Ormaig in Argyleshire; had two sons, John and James, the former of whom predeceased her, leaving a natural son (the residuary disponee); that her other son James, having become embarrassed, took up his abode within the Sanctuary; and that, having fallen into bad health, she came to reside with him, bringing her natural grandson along with her. James having died on the 2d of November 1822, she employed Mr. Rollo (who was her confidential law agent), and his head clerk, to carry the body to be interred in the family burying ground in Argyleshire, which they did.

The proof in relation to her capacity was confined chiefly to the period immediately preceding and following this event. A servant who had been with her from Whitsunday until Martinmas 1822 deponed, "That Mrs. Mackinnon's son, Captain Mackinnon Campbell, was then living with her in bad health, and died while witness was in her service; that, about eight days before his death, a Mrs. Macleod from Leith came to the house, and took the whole charge of it till his death, and continued to take charge of it when the deponent came away. Depones, that for some weeks before Mrs. Macleod came there, Mrs. Mackinnon was quite correct in her habits; that on the Sunday night of her arrival she filled her quite drunk, and she kept her so all the time the witness was in the house; that the spirits which she drank were mostly got from Mr. Taylor by Mrs. Macleod's order, and the witness sometimes went for them, and sometimes Mrs. Mackinnon's grandchild; that she recollects that Mrs. Mackinnon was very much the worse of drink on the day of Captain Mackinnon's death; that she was lying on the side of his bed on that day, and was so much intoxicated she did not know what had happened; that Mrs. Mackinnon was very often in her bed after Mrs. Macleod came, and was not capable of going about from drink; that after her son's death she kept her bed more than formerly; but she sometimes got up during the day, and went into the room where her son's corpse lay; that the witness and Mrs. Macleod slept in the dining-room, and she has often seen

March 25, 1831.

“ her prepare spirits, which she took into Mrs. Mackinnon when
“ she heard her stirring, sometimes before six in the morning ;
“ that she always gave her more than a glass, sometimes with
“ water and sometimes plain ; and some mornings she gave her
“ more before breakfast, but she always gave her at breakfast ;
“ that Mrs. Mackinnon sometimes took a hard-boiled egg to
“ breakfast ; that she got spirits occasionally through the fore-
“ noon, and if Mrs. Macleod happened to go out, she desired
“ the witness to give her spirits if she asked for them ; that the
“ deponent has known her drink a bottle and more in a day ;
“ but she cannot say how much she took every day ; that she
“ took scarcely any victuals, and she appeared to the witness to
“ be getting daily weaker ; that the deponent never saw her get
“ up after her son’s funeral, excepting to get her bed made,
“ which was not always done ; that the deponent has heard her,
“ when she got spirits in the night, go through the room
“ retching ; that she continued to drink spirits in this way till
“ the deponent left her service ; that she did not seem to care
“ about eating ; that the deponent has seen her take half a slice
“ of bread at a time, but never more, and this when Mrs. Macleod
“ asked her, but she never asked any for herself ; that they had
“ very seldom broth, but when they had Mrs. Mackinnon took
“ a little ; that she did not eat as if she had any appetite.”

The servant who succeeded this witness, and remained with Mrs. Mackinnon till her death on the 13th of December, deponed, “ That she never saw Mrs. Mackinnon before she hired
“ her, nor did she see her betwixt the time she was hired and till
“ she went home to her service ; that in going to her service she
“ found Mrs. Mackinnon confined to bed, and she was not then
“ taking any charge or management of her own house ; that a
“ Mrs. Janet Stewart or Macleod was taking charge of it, who
“ then lived in Leith ; and the witness understood from
“ Mrs. Mackinnon, that the mother of this Mrs. Macleod was a
“ natural daughter of an uncle of Mrs. Mackinnon ; that
“ Mrs. Macleod appeared to take the entire management of the
“ house till Mrs. Mackinnon’s death, and there was no other
“ person resided in the house but her and the deponent ; that
“ Mrs. Mackinnon never rose out of her bed after the deponent
“ went into her service, except on the second day after she went
“ there, when she expressed a wish to rise, and she got her
“ clothes put on, and went into the dining-room ; but she was

March 25, 1891-

“ not there more than five minutes when she called to the depo-
“ nent to take her back to her bed; and with Mrs. Macleod’s
“ assistance, and leaning upon her, she did get back to her bed;
“ and from that period she was constantly confined to bed, except
“ when she was taken up to get her bed made; that when she
“ did get up for this purpose she required assistance, and
“ Mrs. Macleod and the deponent always assisted her, and
“ placed her upon a couch until the bed was made, and she
“ then immediately returned to it, only remaining up till it was
“ made, and they were as expeditious as they could be in making
“ the bed, as Mrs. Mackinnon was in such a state as not to
“ admit of her remaining out of it for any time; that Mrs. Mac-
“ kinnon lived principally upon toddy, taking no sustenance but
“ a cup of tea in the morning, and sometimes in the evening,
“ and for nearly about the first week she took an egg in the
“ morning; that she took no bread, and never took any dinner;
“ that it was generally Mrs. Macleod who gave her the spirits,
“ indeed always, excepting on one or two occasions the witness
“ gave her some when Mrs. Macleod was out, and it was at
“ Mrs. Mackinnon’s desire she did so; that the toddy was com-
“ posed of whisky, hot water, and sugar; that Mrs. Macleod got
“ up frequently in the night to give her this toddy, and the wit-
“ ness has seen her give it at all hours in the morning, from five
“ o’clock till nine; that the deponent and Mrs. Macleod slept
“ together in a different room from Mrs. Mackinnon for the first
“ fortnight, and after that they slept together on the floor in
“ Mrs. Mackinnon’s room; that the deponent had not much
“ opportunity of seeing what effect the drinking had on Mrs. Mac-
“ kinnon, as Mrs. Macleod would not permit her to go near the
“ bed except when she was making it, or to go near her without
“ her being in the room; and the deponent was seldom in the
“ room except when she was mending the fire or making the
“ bed, and that this was the case for the first three weeks, but
“ for the last week she was more frequently in the room; that she
“ knows that Mrs. Mackinnon drank the toddy that Mrs. Mac-
“ leod gave her; and after the deponent came to sleep in the
“ room she saw her drink the toddy furnished her, but during
“ the last five days of her life she hardly took any thing; that
“ Major Mackay came to the house about five days before
“ Mrs. Mackinnon died, and the bed that used to be her son’s
“ was made up for him before he arrived; that the witness, seeing

March 25, 1831. “ that Mrs. Mackinnon took no sustenance but the toddy, did of
“ her own accord, the third day after she went home to her,
“ prepare a little panada, in which she mixed a glass of white
“ wine; and the witness gave it to her, and she took it in pre-
“ sence of Mrs. Macleod; that the next night after this she
“ prepared some gruel for her, which she also took; and the wit-
“ ness having asked her in the morning whether she was the worse
“ for it, she said, Oh no; she was better for it; and in conse-
“ quence of this the witness was preparing some gruel for her the
“ next night, but Mrs. Macleod in a very haughty way said to
“ her, that if Mrs. Mackinnon would not take it from her, she
“ would not take it from a servant; and the witness therefore
“ desisted from making any more for her; that two nights after
“ this there was a lodger of Mrs. Macleod’s of the name of
“ Gordon came to sup with her at Mrs. Mackinnon’s, and
“ while they were together the witness was desired by Mrs. Mac-
“ leod to prepare some gruel for Mrs. Mackinnon, which she
“ did, and carried it into the room to Mrs. Macleod, who took
“ a bottle of spirits and poured a certain quantity into the gruel;
“ and the witness heard Mr. Gordon exclaim, ‘ Good God! do
“ you put all that spirits in?’ and Mrs. Macleod said, that if
“ she did not do so she would have no peace with her; and
“ the witness saw Mrs. Macleod give the gruel thus mixed to
“ Mrs. Mackinnon, and she saw the latter drink it; that
“ Mrs. Mackinnon drank in the course of a day, during the first
“ three weeks, fully a bottle of spirits; and when they ran out of
“ spirits the witness has been sent at ten o’clock at night for a
“ mutchkin, and the first thing she had to do in the morning
“ was to get a farther supply; that during this time Mrs.
“ Mackinnon appeared to be getting daily weaker, and some
“ days she was not able to get out of bed or be shifted; that
“ Mrs. Mackinnon was occasionally complaining of pain, and about
“ three weeks after the deponent was in the house the deponent
“ mentioned to Mrs. Macleod that she was afraid she had some
“ sore, and she proposed to examine her, and endeavour to do
“ something to relieve her; but Mrs. Macleod said she did not
“ know her temper so well as she did, and she would be apt to
“ spit in her face if she proposed any thing of the kind; that the
“ witness, however, took occasion, when she was in the room
“ alone with her, and with her consent examined her, and she
“ found a sore upon her bottom, which was black, and running

“ a little, and inflamed ; that she put a little fresh butter on it, March 25, 1831.
“ till she had an opportunity of procuring some ointment, and
“ Mrs. Mackinnon thanked her for what she had done, and after
“ this she shifted her frequently ; that there were but few visitors
“ came to the house during the time the deponent was there,
“ and she had instructions from Mrs. Macleod to allow none to
“ see Mrs. Mackinnon while she was out ; that there was no
“ medical attendant on Mrs. Mackinnon until about a fortnight
“ or less before her death ; that Mrs. Macleod told witness that
“ Mrs. Mackinnon did not wish to have any doctor ; that two or
“ three days before Major Mackay came, a young man of
“ Dr. Ross’s called to inquire after Mrs. Mackinnon, as witness
“ understood, by Dr. Ross’s desire, who had attended her son,
“ and wished to know how she was after his death ; that the de-
“ ponent told him of the state in which Mrs. Mackinnon was,
“ and that she was sorry she could not admit him into the room
“ where she was, as Mrs. Macleod was out, and had charged her
“ against letting any body in ; that the young man said there was
“ no matter, as he would let Dr. Ross know she was ill ; that
“ Dr. Ross accordingly came the next day or the day after ; that
“ Mrs. Macleod was then out, but upon his mentioning who he
“ was, the deponent told him, that although she had been pro-
“ hibited from letting any body in to Mrs. Mackinnon, she
“ would let him see her ; that about this time, or before it, she
“ is not quite certain which, Mr. Rollo had called, and said to
“ the deponent that he thought Mrs. Mackinnon should have a
“ doctor ; that she is sure this was after the will was signed, and
“ that Mr. Rollo was in the use of calling frequently before the
“ will was signed ; that on these occasions Mr. Rollo saw both
“ Mrs. Mackinnon and Mrs. Macleod ; that she knew Mr. Rollo
“ was sent for on one occasion by Mrs. Mackinnon after Major
“ Mackay came, but she does not know whether he was always
“ sent for ; that Mrs. Mackinnon was desirous to get rid of
“ Mrs. Macleod ; that she told the deponent she was perfectly
“ happy with her, and that she had requested Mr. Rollo to
“ desire Mrs. Macleod to go home, and the deponent also heard
“ Mrs. Mackinnon herself say to Mrs. Macleod, ‘ Go home,
“ Jessy, and mind your own house ;’ that Mrs. Macleod after-
“ wards said to the deponent, that if she did go home, it would
“ not be to the care of a servant she would leave her dear

March 25, 1831. “ aunt ; that Mrs. Mackinnon always appeared displeased when
“ Mrs. Macleod called her her aunt ; that the deponent never saw
“ Mrs. Macleod drink, excepting perhaps a glass of wine ; that
“ the spirits which were got into the house were not consumed
“ by visitors ; that Dr. Ross’s attendance began after the will
“ was signed, as she thinks, and she is sure it was a full fortnight
“ after she entered to her service that the will was signed, and she
“ thinks not more than a fortnight ; that she recollects several
“ people coming about the executing the will, viz. Mr. Rollo,
“ Mr. Lebrun, and Bailie Gordon, and she was informed of the
“ purpose of their coming by Mrs. Macleod ; that this Bailie
“ Gordon was a wright and undertaker in the Canongate, and had
“ made the coffin for Mrs. Mackinnon’s son, and afterwards made
“ her own ; that it was in the afternoon the will was executed, but
“ before day light had gone ; that Mrs. Mackinnon was, as usual,
“ confined to her bed during that day, but had got it made
“ before they came ; that the deponent observed Mrs. Macleod
“ frequently giving Mrs. Mackinnon toddy in the morning and
“ forenoon of that day, and that rather more than usual ; that
“ the day before the witness remarked, it was dreadful to be
“ giving her so much spirits ; that Mrs. Macleod answered, it
“ was all her own ; that Mrs. Mackinnon latterly could not do
“ without spirits, and Mrs. Macleod gave her them whenever
“ she called for them, which she did frequently ; that the witness
“ saw Mrs. Macleod go into the room with the gentlemen at the
“ time of executing the will, and the deponent saw her standing
“ within the door at the foot of the bed ; that the kitchen-door
“ was on one side of the passage, and the bed-room opposite ;
“ that, previous to the gentlemen coming, Mrs. Macleod told
“ the witness that they were to come that day, for the purpose
“ of making out the will ; that the witness thinks they were nearly
“ about an hour in the room upon this occasion ; that she thinks
“ that there were one or two gentlemen more present besides
“ Mr. Rollo and Mr. Lebrun ; that a day or two after this
“ Mrs. Macleod told the deponent that Mrs. Mackinnon was to
“ go to her house in Leith to reside ; and she gave as a reason
“ for this, that the will would not be worth a farthing unless she
“ went, and she desired the witness to get ready to go with
“ her ; but the witness said that she had come to serve Mrs. Mac-
“ kinnon in her own house, and would not go to Mrs. Macleod’s ;

March 25, 1891.

“ and Mrs. Macleod said, it would be all the witness’s fault if the
“ will was not good ; that upon her going in after this to Mrs.
“ Mackinnon’s room, she repeated the same thing to her ; and
“ Mrs. Mackinnon took hold of her hand, and said, ‘ No, Betty,
“ you shall bide with me in my own house ;’ that Mrs. Macleod
“ had all her things prepared, and put out to the fire to air,
“ and Mrs. Macleod told the witness they were to go round by
“ the Cross on their way to Leith, and she understood they
“ were to go in a carriage, but there was no farther attempt
“ made to remove her ; that the witness was told by Mrs. Mac-
“ leod that she had put away one of her lodgers to make
“ room for Mrs. Mackinnon ; that the night the will was
“ signed Mrs. Macleod went down to Leith, and upon her
“ return she informed the witness she had been telling her
“ lodgers, that although she did neglect them, she would be
“ better of Mrs. Mackinnon’s will, and that, failing Mrs. Mac-
“ kinnon’s grandson, the estate of Ormaig was to go to her
“ (Mrs. Macleod’s) son, and that she was to have also £500,
“ Mrs. Mackinnon’s body clothes and her jewels ; that Mrs. Mac-
“ kinnon never was out of her bed, except to get it made, after
“ the will was signed, and she continued drinking the quan-
“ tities of spirits before described until within five days of her
“ death ; that Mrs. Mackinnon never spoke to the deponent
“ while making her bed, and Mrs. Macleod appeared always
“ anxious to prevent her speaking to the witness, and would
“ come flying into the room whenever the witness went in ; that
“ the room had a strong smell of liquor, and Mrs. Mackinnon
“ also smelt strong of it. Interrogated, whether she can say,
“ upon her oath, that she appeared to her to be generally in a
“ state of intoxication ? depones, that she can and does say,
“ upon her oath, that she was always in a kind of stupor, which
“ the witness imputed to intoxication. Interrogated, whether she
“ appeared to be in that state on the day the will was signed ?
“ depones, that she had taken the same quantity on that day, what-
“ ever more, and was in the same kind of way that day as she
“ always was. From the time the deponent entered her service,
“ she got no directions regarding the house from Mrs. Mackin-
“ non, as Mrs. Macleod took the charge of every thing. Inter-
“ rogated, whether Mrs. Mackinnon was able to carry on
“ conversation with any body who might visit her ? depones,
“ that there were very few people allowed to see her, and

March 25, 1831. “ Mrs. Macleod was anxious to prevent their doing so ; that
“ she recollects Mr. Colin Campbell, an exciseman, who was
“ well acquainted with Mrs. Mackinnon, calling for her, and
“ Mrs. Macleod said she would tell Mrs. Mackinnon he was
“ there, and she went away apparently for that purpose ; and
“ when she came back she said, that Mrs. Mackinnon could
“ not take the trouble to see him.”

The next witness, Dr. Ross, physician in Edinburgh, adduced by the pursuer (appellant), deponed, “ That he attended the
“ son of Mrs. Mackinnon about two years ago, who was then
“ living with his mother in the Abbey ; that this was during his
“ last illness, and he had attended him for several months ; that
“ he died about the 2d day of November 1822 ; that, in the
“ course of his attendance on the son, the deponent frequently
“ saw Mrs. Mackinnon in a state of intoxication, and, in the
“ deponent’s opinion, this habit was carried to a great and
“ disgusting extent ; and she addicted herself, and continued
“ to drink, during the last days of her son’s life ; that he saw the
“ son about two hours before his death, when he was moribun-
“ dus, and the witness considered him in extremity ; that on this
“ occasion the mother was lying on the bed beside her son, and,
“ to the deponent’s best belief, in a state of intoxication, and
“ apparently unconscious of any thing, and he has seen her
“ repeatedly in the same state of intoxication before her son’s
“ death ; but except when under the immediate influence of
“ drink, the witness was not particularly struck with the woman’s
“ appearance ; that the deponent did not see her again for more
“ than a month after the son’s death ; that he sent one of his
“ young men to inquire for her, (as is the deponent’s common
“ practice in families where he attends as medical adviser ;) that
“ this was on the 7th day of December, the Saturday pre-
“ ceding her death ; and, in consequence of the information he
“ got from his young man, he called himself upon the 9th ; that
“ he has no recollection of seeing Major Mackay on that day ;
“ but the appearance of the house and habits of the family were
“ so disgusting to him, that he took little notice of who were
“ present, unless forced on his notice. Depones, that he saw
“ Mrs. Mackinnon on the 9th of December, at which time she
“ appeared to him a feeble exhausted old woman, with no formed
“ complaint, to the best of his knowledge, except such irritation
“ and weakness of stomach as he conceived to arise from the

March 25, 1831.

“ habits of the party. He therefore prescribed, upon that occa-
“ sion, a simple stomachic mixture, from which on the day
“ following his apprentice reported that she had received benefit.
“ He did not see Mrs. Mackinnon again till the 11th, when, in
“ his opinion, a material change had occurred in the aspect of
“ the case, the symptoms then present indicating a disease of the
“ lungs, for which a blister and draught were recommended; on
“ the Thursday the symptoms were aggravated; he then consi-
“ dered the case hopeless, which opinion was confirmed in the
“ progress of the day. A slight remission occurred on the Friday
“ morning, fallacious, however, as the party died before night.
“ Being interrogated, whether he considers the disease in the
“ lungs to have been occasioned by, or to have arisen from, the
“ irritability of stomach which he witnessed upon the Monday?
“ depones, that in his opinion there was no necessary connection;
“ and he conceives none between the state of the stomach on the
“ Monday and the state of the lungs on the Wednesday. Being
“ interrogated, whether, in his opinion, the habits of intoxica-
“ tion of the patient occasioned or contributed to the disease in
“ the lungs to which he ascribes her death? depones, that in his
“ opinion it certainly did contribute to give a disposition to such
“ an affection of the lungs; that the deponent considers the
“ disease of which the party died a frequent consequence of in-
“ temperate habits, especially in subjects in advanced life; but
“ that, in his opinion, the state in which he found Mrs. Mackin-
“ non on the Monday did not lead him to the conclusion, that
“ the disease under which she laboured on the Wednesday was
“ likely to occur, nor did he consider her life in any immediate
“ jeopardy on that day; and he has no reason to suppose that a
“ continuance of those habits would have led to a speedy termi-
“ nation of her life; but that event could not have been very
“ distant, and a continuance in those habits in a few months
“ must have led to a fatal event by exhaustion, or from the frame
“ being worn out by debility; that, from the state of the patient,
“ the remedy of bleeding appeared to be inadmissible; that from
“ the first the disease assumed a fatal character, and when that
“ is the case it generally terminates in about the same time as
“ happened here; that the species of inflammation of which
“ Mrs. Mackinnon died is of a different character from legiti-
“ mate inflammation, and is peculiar to debilitated habits, and is
“ commonly called the Bastard Peripneumonia Notha—a dis-

March 25, 1891. “ ease especially occurring in persons of advanced age, or in
“ debilitated habits, from whatever cause, of which intemperance
“ is a very common one; the disease is more likely to occur at
“ an earlier period of life, where those causes have been in
“ force, than in persons of common habits or ordinary constitu-
“ tion. Interrogated for the defender, depones, That he had
“ attended the son for eighteen months previous to his death,
“ and that during all that time Mrs. Mackinnon and her son
“ lived together, to the best of his belief. Depones, that during
“ the progress of the son’s illness Mrs. Mackinnon expressed a
“ natural anxiety about him when she was in a condition to do
“ so, but the witness saw her often in a state that she was un-
“ able to exhibit any feeling. Depones, that when he called on
“ the Monday, he has no recollection of the servant having told
“ him he could not be admitted, or that she had orders not to
“ admit him, though the fact might have been so, but he would
“ have disregarded such prohibition. Depones, that he will
“ furnish the commissioner with a copy of the prescription he
“ used for Mrs. Mackinnon on the Monday. Depones, that he
“ certainly thinks, if Mrs. Mackinnon had been affected with the
“ disease of the lungs of which she died when he saw her on the
“ Monday, he would have observed it. Depones, that Mrs. Mac-
“ kinnon, when he visited her on the Monday, seemed capable of
“ understanding, and did answer the questions he put to her.
“ Depones, that he has a perfect recollection of some person, as
“ he understood from Mr. Rollo, inquiring at the witness, who
“ was at that time at Baron Hume’s, whether he thought
“ Mrs. Mackinnon was in a state of mind to be capable of
“ altering her settlements? That this was on the Thursday night
“ before her death; and the deponent’s answer was, that, from
“ the state he had left her in the forenoon, he certainly did not
“ think she was competent to do so; that, to the best of his
“ recollection, he had some conversation on the same subject
“ that same evening, after seeing the woman, with Mr. Rollo,
“ and that he remained of the same opinion, but he is not per-
“ fectly sure; but he believes he gave this opinion to Mr. Rollo
“ in Mrs. Mackinnon’s house; that he cannot charge his me-
“ mory or speak certainly as to his having had a conversation
“ with Mr. Rollo on the Friday on the same subject; that the
“ witness, seeing a remission of the symptoms on the Friday,
“ though but a feeble one, had resolved to take the assistance of

March 25, 1831.

“ Dr. Abercrombie about her capability ; but before Dr. Aber-
 “ crombie went there, which was in the evening, she had
 “ died ; that his belief is, that his proceedings on the Friday
 “ were in concurrence with Mr. Rollo, but he cannot say so
 “ with certainty.” The prescription referred to was the follow-
 “ ing : “ R. Spt. ammoniæ aromat. 2 drachms.—Tinct. gentianæ
 “ comp. 12 drachms.—Aquæ 8 oz.—M.—Sig. cochleare mag-
 “ num ter in die sumendum.”

One of the subscribing witnesses deponed, “ That the deed was
 “ executed while she was sitting in bed, and that it was not read
 “ over to her, at least during the time he was present.” The other
 subscribing witness, who was one of Mr. Rollo’s clerks, deponed,
 “ That they were sent for to go in to Mrs. Mackinnon’s bed-
 “ room, and he thinks it was Mrs. Macleod who came for them ;
 “ that he thinks they found Mr. Rollo in the bed-room ; that
 “ Mrs. Mackinnon was sitting up in bed, not supported by any
 “ person, and appeared to have a flannel petticoat about her
 “ shoulders ; that he observed several papers lying on the table ;
 “ that he heard Mr. Rollo ask her if she had heard the deed
 “ read over, and she answered that she had ; that it is his im-
 “ pression that he also asked her if it was her last deed, and he
 “ thinks she said it was ; but he cannot swear as to this question
 “ or answer ; that he thinks Mr. Rollo then had the deed in
 “ his hands, and the deponent saw Mrs. Mackinnon sign it ; that
 “ she was not assisted in signing it ; that he remembers her
 “ taking a watch from the side of the bed to affix a seal to the
 “ deed ; that he thinks it was a wafer seal ; that Mrs. Mackinnon
 “ appeared at this time to be sober.” In this he was confirmed
 by another clerk of Mr. Rollo who had been in attendance.
 Mrs. Mackinnon was about sixty-seven years of age.

After the proof was closed the Lord Ordinary reported the
 cause to the Court on Cases, and on the 14th of June 1827 their
 Lordships “ repelled the reasons of reduction, in so far as these
 “ are maintained on the alleged incapacity of Elizabeth Mackin-
 “ non the grantor at the date of the deed under challenge ;” but
 appointed counsel to be heard as to the objection of death-bed.
 Thereafter, on the 17th of January 1828, their Lordships also
 repelled this reason of reduction, and assoilzied the defenders,
 found them entitled to the expenses of the discussion relative to
 the incapacity, but not in regard to the plea of death-bed.*

March 25, 1831. Mackay appealed.

Appellant.—1. The alleged instructions for the preparation of the deed were confessedly not given till after the death of Mrs. Mackinnon's son on the 2d November 1822; but it is proved, that from that period till within a day or two of her death she was kept in a continued state of intoxication. This was done by a person to whom a large provision was made by the deed; and that deed was prepared and carried into execution by a law agent who was nominated sole trustee, and to whom and to his clerk large legacies were bequeathed. These facts, together with the exclusion of her heir-at-law (with whom she was not on any hostile terms), and the conveyance to a natural child of a son, demonstrate that the deed was not truly the deed of Mrs. Mackinnon.

2. In judging of the question of death-bed, the state of her mind, arising from the circumstances already mentioned, ought not (as was done by the Court below) to be thrown out of view, and the case judged of as if no such circumstances existed. The very object of the law of death-bed is to protect persons in her position from the effects of undue influence; and the general rule of law is, that a deed is reducible *ex capite lecti* where it can be shown that the grantor was ill at the date of the deed, did not survive its execution for sixty days, and never so far convalesced as to be able to go to church or market unsupported. In the present case all the essentials, both of this rule, and all the grounds of expediency on which that rule rests, concur to justify a reduction of the deed. It is proved that the disease of which Mrs. Mackinnon died was a sequel of the state in which she was at the time when she executed the deed, and she died within a few days thereafter, without ever having left her bed. It is also established, that she was precisely in that situation to which the rule is most beneficially applied. She was withdrawn from the management of her affairs and from public view, and subjected to the influence of self-interested persons.

*Respondents.**—1. The deed being *ex facie* perfectly valid and unexceptionable, it is incumbent on the appellant, before she can succeed in setting it aside, to establish, by the clearest and most conclusive evidence, sufficient legal grounds of reduction.

* This was the argument raised in the respondents' case, laid before the House of Lords. They were not, however, on the hearing, required to enter upon it.

It is not pretended that Mrs. Mackinnon was naturally fatuous or imbecile, nor that she had been reduced by any cause, previous to her death, to a state of permanent mental imbecility; but the allegation merely is, that she was much addicted to spirits, and that this had an effect on her corporeal and mental powers; but a habit of intoxication is not a relevant ground of reduction, unless it be alleged that, at the time of executing the deed, the party was in a state of absolute drunkenness, so as to be deprived of the exercise of reason; but, as observed by Mr. Erskine, "a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling." It is proved, however, by the subscribing witnesses and others, that at the time of executing the deed she was quite sober, and understood perfectly what she was about. There is no averment of fraud in the summons, and consequently all the evidence in relation to undue influence is incompetent and irrelevant. The sole question is, Whether, at the date of executing the deed, she was of sufficient mental capacity to do so; and as the appellant has not proved that she was not so, effect must be given to the deed.

2. The appellant has not only not proved that Mrs. Mackinnon was on death-bed when she granted the deed, but has established that she was not so. To constitute a death-bed deed, the grantor must have laboured under the distemper of which he afterwards died immediately before signing it. The deed in question was executed on the 6th of December; and the appellant's witness, Dr. Ross, deponed, that on the 9th "she had no formed complaint, except such irritation and weakness of stomach as he conceived to arise from the habits of the party; and he therefore prescribed upon that occasion a simple stomachic mixture, from which she received benefit; that he did not see her till the 11th, when, in his opinion, a material change had occurred in the aspect of the case, the symptoms then present indicating a disease of the lungs;" and that in his opinion "there was no necessary connection, and he conceives none, between the state of the stomach on the Monday and the state of the lungs on the Wednesday." The disease of which she died, having thus not come into existence till posterior to the execution of the deed, cannot afford any ground of reduction; and the circumstance of the previous habits predisposing to that or any other disease is not relevant, as was decided in the case of Paterson's trustees.

March 25, 1831.

LORD CHANCELLOR.—My Lords, in this case I submit to your Lordships that there is no occasion for the learned counsel on the part of the respondents to proceed, as, on the facts and the law, there can be no doubt that the decision of the Court below must be affirmed. I say this with great respect for the authority of my Lord Glenlee, who differed with the learned Judges on one point; but I must say, that he takes a view of the law extremely different from that which I have always considered to be laid down by the most approved text writers. On the first question I think there is no doubt whatever. The counsel for the appellant have discharged their duty to this poor person, and stated the case in the only way in which it could be stated with any chance of success, by abandoning the first point. They had no ground to stand on after the evidence of the two professional men, who deposed that the lady knew perfectly well what she was about; that she made an objection to taking another person's seal; that she motioned to take her own, and accordingly did seal the deed with her own wafer-seal. No will could ever stand if this instrument were set aside on the ground of general irregularity of habits previous to the execution of it. The only question is, whether it can be reduced *ex capite lecti*, and can be brought within the rules on this head of the Scotch law, which protects a party on his death-bed from the effects of disease—from the efforts of bystanders—on a mind enfeebled by disease, or labouring under great weakness and general infirmity. We have always understood the law of death-bed to be this,—that if a party does not go out unsupported to church or market, or survive sixty days the execution of a deed, the deed is reducible *ex capite lecti*, at the instance of the heir-at-law, who is ousted of his succession by its operation, or of the parties who have a right to stand in the shoes of the heir-at-law, with this qualification, that the maker of the deed must at the time of execution have been ill of the sickness of which he died. It is of great importance that so material a part of the law of Scotland—one so wholesome and so judicious—should be well understood, to prevent mistakes and consequent litigation. I should have been satisfied with merely moving your Lordships to affirm this judgment, without going into the case, had it not been for my Lord Glenlee's doubts; but, in the first place, there is the high authority of Lord Stair, who is plainly of opinion that you must connect the disease with the death, otherwise it is not death-bed. “If sickness contracted be presumed or proved, whether there
“be necessity to prove the continuance of the sickness till death,
“or that the defunct died from the sickness, or if the sickness once
“contracted be presumed to continue, unless convalescence and
“recovery of health be proved, it is commonly held, that if it be
“proved sickness was contracted, and that death followed, probatis

March 25, 1831.

“ *extremis præsumuntur media* ; and sickness once being proved is
 “ presumed to continue, otherwise it were scarce possible, by a posi-
 “ tive probation, to instruct the continuance of the sickness till death ;
 “ and this is only, *præsumptio juris*, laying the burthen of probation
 “ upon the party that alleges convalescence.” That the convalescence
 must be such as is recognized by the cases appears clear ; for about
 the time of my Lord Stair’s book there were two old decisions on
 the express ground I am now taking, and which the majority of the
 Court below took in this case. Consequently, we may assume that
 Lord Stair had the law as laid down by these decisions more imme-
 diately in view when he holds that convalescence means, not a total
 convalescence of the disease, whatever it was, but such a conva-
 lescence as disconnects the effect of his death from the disease.
 If a party is labouring under the disease A. at the time of exe-
 cuting a deed, and if the disease is such as he shall within six days
 be convalescent, you disconnect the disease A. with the death,
 the death being occasioned by the disease B. Then observe what
 Erskine says : “ It is sufficient to constitute a death-bed deed, that
 “ the granter laboured under the distemper of which he afterwards
 “ died immediately before signing it.” These writers, then, lay
 down the doctrine very clearly ; but neither their statement nor the
 direction of the learned Lord Chief Commissioner, in the case of
 Paterson’s Trustees v. Johnson, appear to have been sufficiently at-
 tended to by the eminent judge I have alluded to. There the disease
 was of the prostate gland, which in an old man, I believe in most
 men, is incurable, and must have terminated fatally. If no other
 had supervened he might have lived for some time ; but acciden-
 tally he goes out and commits an act of irregularity, as it is called,
 but which one can hardly give so harsh a name to, that of eating
 fried eggs for his supper, and drinking a little brandy and water—
 certainly not an act of intemperance, but of imprudence, in a vale-
 tudinarian. A bilious attack followed. No doubt there was a mate-
 rial difference between the two cases, inasmuch as in the one you may
 see connexion between a very debilitated habit and the intemper-
 ance ; but you cannot say there was any connexion between the
 disease of a prostate gland and the imprudence which the man was
 guilty of. But we find that the learned judge, in dealing with that
 case, lays down the law precisely as it is given by Lord Stair and
 by Erskine. “ The jury will attend particularly to Dr. Gregory’s
 “ evidence. Upon a very particular and correct statement of the
 “ evidence given by the other medical men, Dr. Gregory has been
 “ asked, whether he considered the death to arise from the irregu-
 “ larity or from the previous disorder ? And he has given it de-
 “ cidedly as his opinion that the death arose from the irregularity,
 “ and not from the previous disorder. That coincides with the

March 25, 1831. " opinion of two of the witnesses, and it is for you to consider
" whether there be any testimony to affect that evidence ;
" not, then the law of death-bed does not apply, as it is necessary,
" to bring the case within that law, that the person should die of the
" disease of which he was ill at the time he executed the deed ; but
" if he died of another disease, though within that time, it has no
" effect on the deed." If a man has a disease on him which continues till the time of his death, but dies by an accident, or of a different disease, the deed executed under the first disease will not be reducible *ex capite lecti*. A new trial was moved for in the Court of Session, showing that there was no disposition to give up the question—no compromise—and that the party had the means of carrying the proceeding further ; but what I have just cited was not even alleged as a misdirection of the learned judge. This seems to show that the sense of the profession in Scotland is with the law as laid down by the Chief Commissioner and Lord Pitmilley in *Paterson v. Johnson*, and they appear not to differ with what was held in the case of *Primrose*. There the surgeon who attended the old man saw him a week before his death ; and he proved in evidence, that, in his opinion, the iliac passion threw him into a lingering distemper, whereof he at last died. You need not inquire how long the disease lasted, or how slow may have been its progress. It may have crawled on from day to day with the slowness of a chronic disease. Still if it was in the party at the time he executed the deed, and continued without the supervention of any other disease, or the occurrence of any fatal accident, until the time of his death, nothing but the sixty days, or going to church or market unsupported, can get rid of the objection *ex capite lecti*. This case of *Primrose*, so far from being an authority against the law as laid down by the judges, is a precise authority in support of it.

I shall not enter into the facts of the present case ; but Ross's evidence gives reason to believe that a new disease supervened. I don't say there might not be a predisposition—that is given up. A person may be predisposed to a disease half his lifetime, or he may have an organic affection, which may in the end terminate in death. We have had cases on the subject in the Courts of law as to policies of insurance, where this discussion is frequently raised ; but if, in consequence of the organic mischief, a person takes another disease, which, without the organic mischief, he would in all probability never have been stricken with—if there is any affection of the liver, the heart, or the bowels, which predisposes him, upon any accidental circumstance, to take a disease, which, but for the peculiarity in his organic structure, he would not have taken, you cannot say that the mere predisposition arising from the habit of the man's body, or that the organic disease, was that of which he died. The disease is one

thing, the predisposition is another. Drunkenness predisposes to many things, such as apoplexy and paralysis, and no doubt, among others, to bastard peripneumonia. It predisposes to all diseases. The predisposition is the remote cause; the accident is the proximate cause; the disease is one thing, and predisposition is another. If I see in the evidence of Dr. Ross that there was nothing but the predisposition which existed from drunken habits, then it brings the case within the law, as I have ventured to lay it down. What is the fact? On the 6th the deed is executed. On the 9th he sees her; and he is so little struck with her being in a dangerous state of bastard peripneumonia, or any other mortal malady, that he prescribes for her, what I have no doubt was a usual prescription, a draught, to give her an appetite, or what is commonly called a stomachic tincture. He gives her two drachms of aromatic spirit of antimony; then he gives her twelve drachms of tincture of gentian, and eight ounces of water; and she is to take this three times a-day, in order to repair her injured stomach. On the 11th he returns (five days after the execution of the deed), and he finds that things are totally changed. She is much worse then, having been seized with a violent affection of the lungs. He would have bled her (he did blister her), had she not been in so exhausted a state that he could not venture to have recourse to the lancet. He tells you in distinct terms that he considered this to be a new disease supervening even after the 9th—much more after the 6th. Then he says she died in about the same number of days he had expected. This is very material, as it distinguishes the disease from the habit of body, which might have predisposed to it. It certainly brings this case within the principle of the authorities I have referred to. On these grounds, I move your Lordships that you should, in this case, without costs, affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities. — Reg. Mag. II. 18. 7 et 9; Craig, De Feudis, Lib. 2, Dieg. 1, sec. 28; Dirleton's Doubts v. Legitima Liberorum, p. 112; Act of Sed., 29th February 1692; Stair, III. 4. 28; IV. 20, 41; Mackenzie III. 8. in fin.; Mackenzie's Works, I. p. 47; Bank. III. 4. 32; Ersk. III. 8. 95, 96; Bell's Com. I. p. 84; Crawford v. Coutts; 2 Bligh's Rep. 660; Tait on Evidence, p. 435; London Medical Dic. V. Peripneumonia Notha; Urquharts v. Urquharts, 24th June 1742 (Elchies, vo. Death-bed, No. 14.); Primrose v. Primrose, 27th July 1756 (3300); Crawford v. Kincaid, 27th July 1782 (Hailes, II. p. 907); Hiddleston v. Goldie, 12th April 1819 (Murray's Rep. II. p. 115).

Respondent's Authorities. — Ersk. III. 1. 16; Stair, III. 4. 28; IV. 20, 44; III. 8, 96; Paterson's Trustees v. Johnston, 24th June 1816 (Murray's Reports, Vol. I. p. 71); Hiddleston v. Goldie, supra.

D.M. JOHNSTON—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

No. 17.

GEORGE PENTLAND, Appellant.

JAMES BOOTH, Trustee for the Royal Exchange Assurance Company, and others, Respondents.

Process.—Landlord and Tenant.—Held (affirming the judgment of the Court of Session), that it is competent for a landlord to insist in an action of mails and duties, and a process of sequestration, against a tenant, at one and the same time ; but costs of appeal refused to the landlord.

March 31, 1831.

2D DIVISION.
Ld. Mackenzie.

LADY ELIBANK was proprietrix of the estate of Bachilton ; and in April 1805 she and Lord Elibank, in consideration of a certain sum of money, agreed to pay an annuity of £450 during her life to the Royal Exchange Assurance Company. In security thereof, they disposed the estate of Bachilton to James Booth, in trust for the Company, to the extent of the annuity, and quoad ultra for themselves. Infestment was taken in the same month, and the trustee drew the rents through the medium of a factor.

On the 4th of April 1817 Lord Elibank, with consent of his wife, granted a missive to Pentland in the following terms:—“ I have received yours, making me an offer for an improving lease, on expiry of the present leases, of the lands of Bachilton, to be in your option as to the length or mode of lease, according to the act of parliament regarding leases on entailed estates ; you agreeing to build, at your own expense, a farmhouse and offices to the extent permitted by act of parliament, or having recourse against the heirs of entail for the expense laid out, and that expense regularly reported, as in like cases so authorized, interest being allowed during the lease for the monies so laid out, you paying me the rental, as now paid, of £660 sterling, this agreement to be drawn up on stamped paper in proper time and due form, and to be binding on both parties. I accept your offer, and I am, &c.” This missive was subsequently challenged by Lord and Lady Elibank, but it was sustained ; and they were ordained, in an action at the instance of Pentland, to execute in his favour a lease in terms of it. In the month of February 1822 they executed a lease which contained the following clause:—“ And in respect that the whole farmsteadings, houses, and biggings on the lands and estate hereby let are uninhabitable, great part of them having fallen down through decay and old age, full power and liberty is hereby

“ given to the said George Pentland and his foresaids to take March 31, 1831.
 “ down the whole of these steadings, houses, and biggings in
 “ any way he or they may consider best, and to use the ma-
 “ terials thereof as he or they may think proper ; and the said
 “ Right Honourable Janet Oliphant Lady Elibank, with advice
 “ and consent foresaid, and the said Right Honourable Alex-
 “ ander Lord Elibank her husband, for himself and for his
 “ interest, bind and oblige themselves and their foresaids im-
 “ mediately to expend, upon building a new stading or stead-
 “ ings, as may be found most advisable by the tenant, and for
 “ repairing the mills, pigeon-house, and other outbuildings on
 “ the estate, the sum of £3,200 sterling ; and in the event
 “ that the tenant and his foresaids shall advance for the pro-
 “ prietor the proportion of that sum which, in terms of the
 “ act of parliament referred to, can be rendered an existing
 “ charge upon the next heir of entail in the said estate, the
 “ said Right Honourable Janet Oliphant Lady Elibank, with
 “ advice and consent foresaid, and the said Right Honour-
 “ able Alexander Lord Elibank her husband, for himself and
 “ for his interest, bind and oblige themselves to adopt the ne-
 “ cessary measures prescribed by the statute for rendering such
 “ sum an existing charge against the succeeding heirs of entail,
 “ and to assign and convey such claim to the tenant and his
 “ foresaids, in such shape and form as he may find necessary,
 “ in security of his obtaining repayment of such advance if
 “ made by him, as well as to allow him and his foresaids de-
 “ duction out of the yearly rent, payable as before specified, of
 “ the interest of such sum or sums as may be so advanced by
 “ him, for the purposes aforesaid, from the period of advancing
 “ the same, till he be repaid.” Pentland enjoyed possession in
 virtue of this lease.

In July 1824 Booth, as trustee for the Assurance Com-
 pany, brought an action of mails and duties against Pent-
 land, concluding for payment of the rents of crops, 1822
 and 1823, and of those to fall due in time coming during his
 lease. In defence Pentland pleaded, that as Lord and Lady
 Elibank had failed to implement the above obligation in the
 lease by erecting houses, he was entitled to retain the rents in
 liquidation thereof. The Lord Ordinary, on the 12th of May
 1826, decerned for the rents of the years from 1822 to 1825
 inclusive, and issued the subjoined note of his opinion. “ Note.

March 31, 1831. “ — The Lord Ordinary thinks that the defender is not in bonâ
 “ fide to plead retention, upon the stipulation of expenditure by
 “ the landlady in the new lease, against the claim of the an-
 “ nuity for payment of the rents, to the extent sufficient for
 “ payment of the annuity. The Lord Ordinary thinks, that
 “ under fair ordinary administration, and with a just regard to
 “ the interest of the annuitants, Lady Elibank could not, in the
 “ circumstances of the case, grant, nor the defender accept, any
 “ new lease or new stipulation, qualifying the previous missives,
 “ which should prevent the rent from being payable annually, at
 “ least to the amount necessary for payment of the annuity;
 “ and therefore that the defender is not in bonâ fide to plead
 “ to this effect the stipulation which was taken. The Lord Ordi-
 “ nary does not think reduction necessary to exclude a plea of
 “ that sort. That the right of the pursuer is not exclusive of all
 “ administration by Lady Elibank and her husband seems to
 “ be settled by the decision of the Court, of which the statement
 “ was not, in so far at least, denied by the pursuer.”

Pentland paid these rents, and also that of 1826; but having resisted payment of that for 1827, Booth revived the action of mails and duties, and at the same time applied for and obtained from the Sheriff of Perthshire a warrant of sequestration of Pentland's effects in security and payment of the rent 1827.

In the meanwhile Lord and Lady Elibank had executed another trust-deed in favour of Patrick Campbell, who, in virtue thereof, also applied for and obtained a warrant of sequestration against Pentland. Of these processes Pentland brought advocations to the Court of Session, ob contingentiam of the action of mails and duties. He then maintained that the procedure against him was ruinous and oppressive—that he was entitled to retain his rents in security of implement of the clause in his lease, and that at all events he was not in safety to pay to Booth in respect of the claim made by Campbell. The Lord Ordinary having decerned against him for the rent of crop 1827, and found him liable in expenses, he reclaimed; and the Court, on the 5th of December 1829, pronounced this judgment: “ In
 “ respect that, on the part of Patrick Campbell, trustee for Lord
 “ and Lady Elibank, it has been expressly admitted at the bar
 “ by his counsel that the pursuers in this process are preferable
 “ to him in their claim to the rents decerned for by the inter-

“locutor of the Lord Ordinary under review, the Lords adhere March 31, 1831.
“to that interlocutor, and refuse the prayer of the note.”*

Pentland appealed.

Appellant.—1. The procedure against him has been both incompetent and oppressive. The lease contains a clause of registration, in virtue of which diligence could issue against him for payment of the rent; and therefore a separate action of mails and duties was only calculated to create expense. But the respondent had recourse, not only to such an action, but also to a separate process of sequestration; so that while he was thus insisting before the Court of Session for payment of the rent of 1827, he was also making the same demand before the Sheriff of Perthshire in the process of sequestration. The appellant was not bound to defend himself in both of these processes, but was entitled to have one or other of them instantly dismissed. In addition to this oppressive procedure, he was subjected to the expense of defending himself against a separate action by the trustee of Lord and Lady Elibank.

2. As dispositions have been granted to two parties having separate interests, viz. the respondent and Campbell, the appellant is not in safety to pay to the respondent, and the interlocutor of the Court below can afford him no protection. An interlocutor is good evidence of the judgment of the Court, but it is no evidence whatsoever of a statement made by a party. If the statement had been entered by the party or his counsel on the record, it might be evidence against him; but there is nothing appearing on the record to warrant what is set forth in the interlocutor, which confessedly rests on a mere supposed oral statement made at the bar. It, however, necessarily admits the relevancy of the appellant's objection.

Respondent.—1. By the law of Scotland double remedies for payment of debt are competent. A creditor may proceed, not merely against the person, but also at the same time against the property. The respondent was no party to the lease; he had therefore no right to proceed by diligence in virtue of it against the appellant, but was entitled to bring his action of mails and duties. The decree in that action would entitle him to proceed against the appellant's person, but it would not have the effect

* 8 Shaw and Dunlop, No. 85.

March 31, 1831. to constitute his right of hypothec real over the stocking on the lands. To accomplish this it was necessary to have recourse to a process of sequestration, otherwise the security might have been lost altogether.

2. The infestment in favour of the respondent was many years prior to the deed in favour of Campbell, and therefore, without any admission on Campbell's part, was clearly preferable to and exclusive of his right. Accordingly, he judicially admitted this, and this admission is ingrossed in the judgment, and he does not appear as a competing party. The appellant therefore is in perfect safety to pay to the respondent.

LORD CHANCELLOR.—My Lords, in this case I can have little hesitation in recommending your Lordships to affirm the interlocutor appealed from. The only point upon which it may be necessary to say a word is that insisted upon by the counsel for the appellant, touching the two actions. Now, it may be very true that a hardship arises to a party, in particular cases, from the structure of the law in this respect. There may be two remedies, yet the second so far inconsistent with the first that it may render the party against whom it is given incapable of complying with the requisition of the first. For instance, a party owing money is arrested and put into prison; he thereby loses the benefit of his labour, out of which the debt might be paid. No doubt it may be exceedingly hard for the debtor that the creditor should be at liberty to disable him from satisfying his lawful demand. So, when a distress is laid upon a farm, there is an end of all power to provide for payment of the rent; and it may be exceedingly hard that an action should be brought for rent, when by distraining the landlord gets hold of the property of the tenant, out of which the rent is to be satisfied. Nevertheless it is perfectly clear by our law that you may first arrest the debtor, and by force of that arrest deprive him of the means of paying the debt; so that, unless he has goods and chattels, subject to the concurrent remedy against the goods, as well as taking the body in execution, he cannot obtain by his labour wherewithal to pay the debt. In like manner the landlord may distrain the stock and crops out of which the rent may be payable, but he may at the same time do more; having issued a warrant of distress, he may the same day bring an action, and recover the amount of the rent reserved in the lease. Our law, however, by a statutory provision that exists not in the Scotch law, prevents in a great measure the conflict of the two proceedings, by limiting the possession under the distress to a small number of days. But it by no means follows, that because a hardship may arise out of or an oppressive use be made of legal remedies, the party seeking to avail himself of them

has not a right to do so. We must go by the law as it now stands. March 31, 1831. Now, the Scotch law provides that one form of proceeding being adopted at the same time with another, the party so dealing shall be put to his election, the other party being entitled to a plea of *lis alibi pendens*. This was attempted here, but it was found incompetent; and it is easy to see upon what ground that plea was so held. To support such a plea there must not only be the same parties, but the same subject matter. If there had been two sequestrations, or if there had been two actions of *mails and duties*, the *lis pendens* would have been a bar to the second action; but here it is, *alio intuitu*; it is an action of sequestration. With us the landlord distrains of his own authority. In Scotland he must go to the Court, and have a process of sequestration; but then he has more power than we have here; he is stronger in the second stage of the proceeding than we are. In the first stage he must go to the judge. Here, having levied the distress, we are restrained to a certain number of days; there, having once got the sheriff's warrant, there is no limit fixed to the time within which the distress must be brought to sale; but the object of that is security, to obtain the effect of the landlord's hypothec over the crop, to prevent the goods being removed off the ground, and not an action for *mails and duties*. For a sale it may be more effectual; it is a proceeding in *rem*, and accompanied with instant recourse against the property; possession is given under the sequestration; the goods are exposed to sale; and the action of *mails and duties* is brought against the person, through which you can obtain recourse against the goods. It is true, you may, if the demand is not complied with, obtain execution against the person at the same time also; but in the other case—and I state this to show how totally different the actions are—it is a security by which you take possession by making your hypothec effectual;—you take possession of the crops until you are paid. I admit there is a great hardship in a man keeping hold of that, and he may use it oppressively at the same time that he is going against the party for the *mails and duties*, there being no limit as to the power of keeping hold of the subjects in question; but it is rather a rhetorical than a strict view of the subject to say that you, at one and the same time, bring your action for the payment of the rent, and take the property out of which the rent is to be paid. The rent of the current year ought to be satisfied out of the crop upon the ground at the time the rent was due for the bygone time. The action was for the *mails and duties* of 1827, was it not?

Robertson.—It was for each year, and the sequestration was for the payment of the rent just due, and the rent to come due.

LORD CHANCELLOR.—So far it is rather a hardship that he should be subject to this double remedy; because making the hypothec effectual by sequestration goes beyond a mere security,—it gives

April 2, 1831. the power of bringing to sale ; and there is no limit to the sale ; and I cannot help wishing, that when we are talking about the landlords' hypothec, the landlords would turn their attention to the tenants, and give them a little relief from the pressure of this law ; but upon the law I have no doubt. If this was oppressively used, the landlord would be liable to an action for damages ; but the appellant, Mr. Pentland, has been somewhat litigious. He rests quite satisfied with the interlocutor in the first action, and allows it to become final, when he might have appealed against it in that case as well as now. He permits another litigation to be commenced, and then prosecutes it to an appeal. I therefore move your Lordships that this judgment be affirmed ; but, in respect of the hardship of the case, I am not disposed to allow costs.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

G. W. POOLE—G. RICKARDS,—Solicitors.

No. 18. TRUSTEES of Stonehaven Harbour, Appellants.—*Lushington—Robertson.*

Sir ALEXANDER KEITH, Respondent.—*Lord Advocate (Jeffrey) Sandford.*

Statute—Clause.—Held (affirming the judgment of the Court of Session), that statutory trustees, under a power to open quarries, had no right to enter to and take stones from a quarry open and worked prior to the statute.

April 2, 1831.

2d Division.
Ld. Mackenzie.

THE town of Stonehaven is situated on the east coast of Kincardineshire, which is bold and rocky. It is contiguous to the sea, and stands on low ground between the sea and a high bank. In this bank, which is called the Braes of Stonehaven, there has been for time immemorial a quarry called the Red Craig Quarry. In the neighbourhood of the town, and along a great part of the coast, there is an unbroken barrier of rocks, the value of which was said to be very trifling to the proprietors, but the stones which could be excavated from them were well adapted to the building of a harbour. The Red Craig Quarry was in possession of and claimed by the respondent, Sir Alexander Keith of Dunnottar, as his property, under titles from the family of Keith, and more recently from the commissioners on forfeited estates. Although the validity of his title was disputed, it was admitted that he had for several years let the quarry and drawn rents for it.

April 2, 1891.

In 1825 an act of parliament was obtained (under which trustees and commissioners were named), proceeding on the narrative,—“ The harbour of the burgh of barony of Stone-
 “ haven, the head burgh of the county of Kincardine, situ-
 “ ate in the bay of Stonehaven, on the east coast of that part
 “ of Great Britain called Scotland, is of great utility to naviga-
 “ tion in general, being one of the most accessible harbours be-
 “ tween the Firth of Forth and the Murray Firth, and would be
 “ rendered of still greater utility, and more advantageous to
 “ trade and navigation, if the same were enlarged, deepened, and
 “ protected by additional piers and breakwaters, and proper
 “ works erected therein, or in the said bay adjoining thereto,
 “ and if the streets and avenues leading thereto were widened
 “ and repaired, and if rules and regulations were established for
 “ preserving due order within the same.” Power was therefore
 given to erect piers, quays, &c.; and it was “ farther enacted,
 “ that it shall and may be lawful for the said commissioners, or
 “ any person or persons appointed by them for that purpose,
 “ and they and such person or persons are hereby empowered,
 “ to open quarries in any waste or common in the said county of
 “ Kincardine (not being farther distant than one mile from the
 “ high-water mark), or within high-water mark on the shores of
 “ the said county, and to dig, gather, and take away therefrom
 “ stones, gravel, sand, clay, furze, heath, rubbish, or other ma-
 “ terials necessary for constructing any of the works authorized
 “ by this act, without making any compensation for the same;
 “ and also to open quarries, and to dig, gather, and take away
 “ therefrom stones, gravel, sand, clay, furze, heath, rubbish, or
 “ other materials (timber excepted) in and out of any grounds,
 “ whether inclosed or not, (not being the ground whereupon
 “ any house stands, nor a garden, orchard, planted walk, lawn,
 “ or avenue to any house, or any piece or parcel of ground set
 “ apart or used as a nursery for trees, previous to the passing of
 “ this act), where the said materials can most easily be found,
 “ within two miles of the said harbour, for the construction of
 “ the said works, making recompense for the damage thereby
 “ occasioned in manner herein-after mentioned: Provided ne-
 “ vertheless, and be it further enacted, that it shall not be lawful
 “ for the said commissioners, or any other person or persons,
 “ under the authority of this act, to dig, gather, take, or carry
 “ away any such materials in or from any inclosed grounds or

April 2, 1831. “lands, until notice in writing shall have been given to the
“proprietor or occupier of the premises,” &c.

In virtue of this authority, and alleging that the Red Craig Quarry was situated within a mile from high-water mark, and part of a waste or common, the trustees intimated their intention to enter the quarry, and excavate stones for the use of the harbour, without making any compensation to Sir Alexander Keith. In the course of the discussion which ensued relative to their right to do so, they farther founded upon a feu contract between the Keith family and certain feuars of Stonehaven in 1624, which contained this clause: “Whilk persons and inhabitants
“that shall happen to be feuars in the said town in all time
“hereafter shall have property belonging only to the said feuars
“and feus thereof, the commony and privileges after mentioned,
“viz. in commony of pasturage of all and haill the Braes of
“Stonehaven, as wind and weather shears, betwixt the common
“way that passes on the west end thereof to Montrose, eastwith to
“the Bridge of Downie,” &c.: “As likewise, for upholding of
“the common weal of the said town, of building of bridges and
“calseys, the said noble lord, for himself and his foresaids, has
“dispensed, and by thir presents dispenses with, in favour of the
“said inhabitants, to be employed as said is, the whole land-
“customs within the said town and privileges thereof in all time
“coming, and for collecting and ingathering thereof, and fur-
“thering of all common works requisite and justly for that
“effect, to all persons having interest, it is specially conde-
“scended that the said noble earl, his bailies, ane or more, with
“ane neutral man chosen amongst the said inhabitants, who shall
“do for them as conjunct bailie, shall in one voice pronounce
“and give out sentence in all actions civil concerning the com-
“mon weal of the town,” &c.

It was alleged by the trustees, that the feuars had thenceforth enjoyed the privilege of taking stones from the quarry, and had derived a revenue by letting the braes and selling the stones. Sir Alexander admitted that the feuars had been allowed occasionally to take stones for their ordinary purposes; but he alleged that this was a mere tolerance, and that at all events it could not warrant a more extensive right than that which had been possessed. The trustees did not aver that they had any title to this feu contract; but Sir Alexander intimated his readiness to argue the question, on the supposition that they had obtained such a title.

Against the threatened act of the trustees he presented a bill of suspension (which was passed), in which he prayed that the appellants should be prohibited “from entering upon
“and opening quarries in the suspender’s said lands and barony
“of Dunnottar, or any part thereof, more especially his said
“quarry of Red Craig, and from quarrying or carrying away
“stones or other materials therefrom, without making good to
“the suspender and his tenants in the said lands and quarry all
“damage occasioned by their proposed operations, and paying
“for stones or materials used or taken by them therefrom.”

The Lord Ordinary suspended the letters simpliciter, found the trustees liable in expenses, and issued the subjoined note of his opinion : “The feuars of Stonehaven appear to have no
“title to any thing but the pasturage of the braes. This is plain
“from the words of their contract of feu, when stated with
“accuracy (which has been too much neglected) ; and then
“there seems to be no doubt that the suspender has title and
“possession sufficient to exclude strangers, and the chargers
“seem to be strangers, for the act of parliament appears not
“applicable to quarries existing as open quarries previous to its
“date.”

The trustees having reclaimed, and it being pleaded, that as the question truly at issue related to the Red Craig Quarry alone, whereas the Lord Ordinary’s judgment, taken in connexion with the prayer of the suspension, applied to the whole estate of Dunnottar, parts of which might fall under the powers conferred by the statute, the Court, “in respect of it being admitted by the
“suspender and understood that the interlocutor reclaimed
“against shall apply only to the Red Craig Quarry,” adhered.*

The trustees appealed.

Appellants.—1. It is not disputed by the respondent that the quarry is situated within a mile of high-water mark; but his defence is rested on the ground that no power was conferred upon the appellants to work quarries which had been opened previous to the statute, and to this the Court below had given effect. Although it is true that power is given to the appellants to open quarries in any waste or common, yet it was never in-

* 7 Shaw and Dunlop, No. 205.

April 2, 1831. tended that this was to prevent them from having the benefit of quarries already opened ; on the contrary, authority was granted to them “ to dig, gather, and take away therefrom stones, gravel, “ &c., or other materials necessary for constructing any of the “ works.” This the respondent alleges is to be construed as conferring a power to take stones and other materials from those quarries only which are opened by the appellants, whereas it is perfectly clear that the word “ therefrom ” has reference to wastes or commons, and consequently authority is conferred on the appellants to take materials from any waste or common situated within the above limits. Now the Braes of Stonehaven, in which the quarry is situated, are confessedly within the limits ; and it is proved by the contract of 1624, and by the admitted facts, that the Braes are a common, and it cannot be disputed that they are also literally a waste.

But, 2. The respondent has no valid title to the quarry, while, on the other hand, the feu contract of 1624 in favour of the feuars, (to which the appellants can, if necessary, obtain right,) with the possession following thereon, bestows upon them a complete right to take stones from the quarry.

Respondent.—1. The sole question is, Whether the appellants shall be allowed to take stones from the quarry without making compensation to the respondent ? but nothing is more directly contrary to the spirit of British legislation than that the property of any private person shall be seized for public purposes without compensation. When words, therefore, are found in a statute which apparently have this tendency, they must be strictly interpreted as inconsistent with those general principles which regulated the legislature. Under the statute in question, the appellants are merely empowered to open quarries in any waste or common. If it had been intended to empower them to appropriate to themselves quarries which had been already opened and in the possession of others, this would have been explicitly stated, because this would have been an encroachment on the existing rights of private individuals, and the act would not have been passed unless either their consent had been proved or compensation provided ; but the Red Craig Quarry has been open from time immemorial ; and from the mode in which the statute was expressed the respondent could not possibly suppose that it was meant to deprive him of his property, and therefore he did not oppose it, which otherwise he would have done.

Neither can it be maintained, consistently with the above principle, that the word "therefrom" refers to open quarries; it plainly relates, either to the quarries opened by the appellant, or to wastes or commons where there are no open quarries; and the meaning is, that from these, and not from existing quarries, the appellants may take materials for building the harbour. April 2, 1831.

2. As the respondent is merely defending his possession, it is unnecessary for him to do more, in a question with one who has no valid title, than to show that he is lawfully in possession; but his title is perfectly good; the feu contract confers upon the feuars only a servitude of pasturage; and even supposing that it could be construed so as to give them right to take stones from the quarry, this must be limited to ordinary purposes, and cannot be extended to the effect of enabling them to build a harbour.

LORD CHANCELLOR.—My Lords, in this case I do not propose to trouble your Lordships at any length with the reasons upon which I shall humbly advise you to affirm the decree pronounced by the Court below. It is perfectly clear, when you look at the construction of this act, that the trustees of the harbour were mere trespassers as far as regards their claim, whatever may be the right of the feuars. I should rather say, that I can see no right that the feuars have; but the trustees are not the feuars; they have no privity with them, much less any identity; and the consequence is, they rest their title entirely upon the act. When you look into the clause, it is quite clear from the first branch of it what is meant, though it is inartificially drawn, as many of these private acts of parliament are; and a great misfortune it is to this House and every other Court. Many days of argument would be saved if they were drawn in a more careful and technical manner, so as plainly to state their intent, and not leave the Courts, as in cases of wills made by ignorant persons, to discover a meaning where the authors may have had none. This clause, however, leaves no doubt of the right to open quarries upon commons and waste places within a mile of high-water mark, and the trustees have a right to do that without compensation. Then come the words, "and to dig, gather, and take away therefrom stones, gravel, sand," and so on. Now it is said, though the term "quarries" is not the last antecedent to which the "therefrom" can apply, it can, however, apply to nothing else. What is the other antecedent? "Any waste or common within high-water mark." You are to dig and carry away and gather the stones, sand, gravel, and so on, "therefrom," that is, from the wastes

April 2, 1831. and commons. I do not think it applies to the other antecedent "quarries." The meaning of that clause is quite well known in all bridge acts, quarry acts, and road acts. You want stones and rubbish to fill up the interstices in making piers, as well as for putting metal upon the roads; and the right of taking stone without compensation is expressly given by these sort of words, to dig and carry away. When you say dig, gather, and take away from waste places, it is not the stones you quarry, but the stones you find loose. When digging is mentioned, it is "therefrom;" but when quarry is referred to, you are to open quarries;—and for this obvious reason, the Legislature never would have given a power to these trustees, without compensation, to go to a quarry already opened, that belonged to Sir Alexander Keith or to the feuars, or both or neither, and carry away the stone. Can we say the Legislature meant to give the right to work a quarry already in use, and, without compensation, to carry away the stone, merely because it was convenient—because it lay handy? If it is handy, that is a reason why they should pay for it; but it is said Sir Alexander Keith may make high terms. To be sure—it is his property; if it is not his, it belongs to the feuars; but the parties to whom it does not belong are the harbour trustees. They come and claim it; that is, they say it is an open quarry—a quarry in use—and it is a valuable possession. They admit it is so valuable that it was a subject of controversy, but that Lord Keith renounced his right in favour of the present respondent; and it is admitted that Sir Alexander Keith got a rent, as far back as 1811, of above £23; and as rents will rise in the course of time, when more buildings are going on, it may be worth £240. At all events it is worth something—it is a quarry in actual work. Could the act mean to include, under the power of opening quarries in waste lands, those which were actually opened? But if it meant that they should go and take advantage of all the expensive works at a quarry, would it not have said so? or said you may take stones from quarries already opened? There was Red Craig Quarry staring them in the face. If the trustees knew they could calculate upon it, their not mentioning Red Craig Quarry is a remarkable circumstance in their conduct; and it reflects no credit upon them, in my opinion, if they mean to say, that when they drew the clause they abstained from putting that into the act, in order to bring it under the general sweeping power of digging stones in waste places. Then it is said, Sir Alexander Keith has not made out his title; but it is not necessary. He has exercised acts of ownership. I have seen trespass maintained upon infinitely less evidence in the case of a quarry; he uses it, and lets it, and obtains rent, by the admission of the appellants, twenty years ago. Suppose

Sir Alexander Keith has not such a title as would stand the test in an action in which the title was in question, that will not benefit the appellant, for this is an action only to interdict the commissioners, who have no right to act as they have done. It is upon this ground that the learned judge Lord Mackenzie, than whom there is none more sagacious, held that this is an action against a stranger. It is upon this ground, and consistently with all principle, that I feel there can be no doubt the decision below was right; but it is objected, that this will decide that Sir Alexander Keith has a right to the price. It decides no such thing; it only decides, in hoc statu, that the commissioners shall not go on digging what he denies them right to; or, if they go on digging, they shall make him compensation; that is, if they go on with their proceedings, which are against law. It is to prevent them from going on, and not to raise the question, whether or not he is entitled to the price. If he brings his action for that, he must show his title; but if they go on they shall pay for what they take; than which there cannot be any thing more equitable and according to principle, or less raising the question of Sir Alexander Keith's title. It appears to me, upon the whole, if one were to go out of the way to notice it, that he has a right, and a better right than any one else. If he has no right, the feuars may have some right, though that does not appear to be very clearly established. The Lord Ordinary thought they had not established it. We are not called upon to say whether they have or not. It is only necessary to say, that the appellants are not the feuars, but are mere trespassers. The appeal must be dismissed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities.—Wolfe Murray, Dec. 8, 1808 (F. C.); Feuars of Dunse, Nov. 22, 1732 (1,824); Leslie, Nov. 27, 1793 (14,542).

Respondent's Authorities.—2 Ersk. 2, 9, 14, 34; Leslie, Nov. 27, 1793 (14,542); 2 Ersk. 9, 4; Feuars of Dunse, Nov. 22, 1732 (1,824).

J. DUTHIE—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

No. 19. WALTER LOGAN and JOHN MAXWELL LOGAN, Appellants.

JOHN WRIGHT, and others, Respondents

Clause.—Where a party feued a steading of ground in Clyde Street, “with a proportional part of the water-side grass, which is to be a common property to the vassals of Clyde Street in all time coming,”—Held (affirming the judgment of the Court of Session), that the property of the water-side grass, and not merely a servitude, was conveyed.

April 2, 1831.

1ST DIVISION.
Inner House.

IN 1774 John Maxwell, proprietor of the lands of Parsonshaugh in the neighbourhood of the Broomielaw at Glasgow, began to feu out the lands, and granted feu rights to Wright and others or their predecessors. These deeds were all in the same terms, and the present question was tried with reference to one granted to Robert Lockhart. By that deed “the said John Maxwell doth hereby, under the conditions and provisions after written, give, grant, and in feu-farm dispone, to the said Robert Lockhart, his heirs or assignees whomsoever, heritably and irredeemably, all and haill these two plots or steadings of ground in Clyde Street, &c., being part of the lands of Parsonshaugh or Rankineshaugh, now part of Clyde Street, as the said two plots are presently stabbed off, with a proportional part of the water-side grass opposite to Clyde Street, corresponding to the above steadings feued, which is to be a common property to the vassals of Clyde Street in all time coming.” Various conditions were then inserted, and, in particular, that it should not be lawful to Lockhart or his heirs to dispone or subfeu the whole or any part of the said two steadings of ground to be holden of themselves,” and that they should be “obliged to build a house or houses on the foresaid steading of ground,” &c. The clause of warrandice was in these terms:—“And further, the said John Maxwell binds and obliges him and his foresaids to warrant the lands before disposed at all hands, and against all deadly, and the water-side grass, from his own proper facts and deeds only; and he hereby assigns to the said Robert Lockhart and his foresaids the rents, maills, and duties of the foresaid lands from and after the term of Martinmas 1772 years, and for ever thereafter.” The precept of sasine was, that “the said Robert Lockhart may be instantly infeft in the foresaid lands,” &c.

Maxwell died in 1793, leaving a trust-disposition, on which the Logans founded their title in the present question.

Under certain statutes for the improvement of the harbour April 2, 1831.
at the Broomielaw, constituting trustees for that purpose, and conferring authority upon the sheriff of Lanarkshire to exercise jurisdiction with the assistance of a jury, a petition was presented by the statutory trustees to the sheriff, stating, that they were desirous to appropriate part of the above water-side ground for the purposes of the harbour, and praying him to summon a jury to estimate the value, and thereupon to transfer the property to them. Appearance was made by Wright and others, who alleged that they were proprietors in virtue of their feu rights; while, on the other hand, the Logans contended that Maxwell had only granted a servitude; that the dominium remained in him, and that it was now vested in them by the trust-disposition. The sheriff, on 3d Dec. 1824, pronounced this subjoined judgment against the claim of Wright and others.* By the statutes it was competent to appeal against this judgment to the Court of Session by petition within a certain number of days; but Wright and others having delayed to do so, a petition presented by them was dismissed †

* “ Finds, That the water-side ground or solum has not been conveyed by the late
“ John Maxwell to the feuars of Clyde Street, and that the terms of the feu right
“ do not imply any right of property, but merely a right of servitude to the grass
“ on the water-side ground: Finds, that though the said ground is declared to be
“ ‘ common ’ to the feuars of Clyde Street, that this confers no substantial or radical
“ right to the ground, but merely the right of using the grass for the common behoof
“ of the feuars of the steadings in the street: Finds, that, upon a fair construction
“ of the deeds, the meaning of the words ‘ opposite ’ to the street must comprehend
“ both the street and the steadings feued along the sides of it; therefore finds, that
“ in estimating the value of the said grounds, upon the whole, the jury will fall to
“ appreciate and apportion the value of the servitude held by the feuars over the
“ solum of said grass-ground, allowing for the breadth, not only of the street or pas-
“ sages between the houses of Clyde Street, but also of the steadings themselves
“ on each side, as fronting the water-side ground: Finds, that it does not appear at
“ present that John Maxwell Logan has a title to the ground in dispute, which
“ seems to have been erroneously disposed by Walter Logan to himself, after-
“ wards by him to James Ewing, and by him to Waddel, and which was by him
“ reconveyed to Carrick: Finds, that a complete and regular feudal title
“ must be made up to said ground before the river trustees can be called on to
“ pay the value or price thereof, to be fixed by a jury.

“ NOTE.—With regard to the feuars, their alleged right does not possess the essen-
“ tials of property. Could they build upon the ground? Could they divide it even
“ among themselves, and lay it out in different possessions? Could they erect
“ wharfs, warehouses, or such like buildings upon it? Certainly not, as the proprie-
“ tor of the ground would be entitled to say that they possessed no other nor greater
“ right than that of servitude.”

† 8 Shaw and Dunlop, No. 247.

April 2, 1831.

Thereafter the statutory trustees made a similar application to the sheriff in relation to another part of the same ground, and appearance having been again made by the competing parties, and the same question again raised, the sheriff found, “ That
“ the rights of the feuars in Clyde Street, parties to this action,
“ was limited to a servitude by an interlocutor of 3d December
“ 1824, as more particularly set forth in an interlocutor of this
“ date, pronounced in the relative process between the same
“ parties, and in relation to the other portions of the same
“ ground,” and appointed a jury to be impannelled. Wright and others having, by petition, complained of this judgment to the Court of Session within the proper time, their Lordships, on the 15th December 1829, altered the interlocutors of the sheriff of Lanarkshire complained of; found that the petitioners have a right of property in the water-side ground in question, and that no other person has made out a right of property to the said ground; and remitted to the sheriff to have the value of the ground ascertained by a jury, in terms of the statute.*

Logans appealed.

Appellants.—The evident intention of Maxwell was, not to convey the property of the ground lying on the bank of the river, but merely a right to the use of the grass. Accordingly, in the feu contract he draws a marked distinction between the ground feued for building, and that in question. In regard to the former, he provided that the two “ steadings of ground
“ should be held of himself, and that buildings should be erected
“ thereon,” and he warranted these steadings against all deadly, while the warrandice as to the water-side grass is from facts and deed only; besides, the appellants were ready to prove, that from 1774 till the period of his death Maxwell had exercised all the rights of a proprietor of the solum of the water-side ground.

Respondents.—The disposition expressly bears, that the water-side grass is “ to be a common property to the vassals of Clyde
“ Street in all time coming.” This is a clear and unambiguous expression, and cannot be construed into a mere right to the herbage. In fact, the term “ water-side grass ” was the name of the property; and the respondents, as proprietors, have for more than forty years exercised various acts of dominion over it.

* 8 Shaw and Dunlop, No. 111.

The appellants also called in question the exclusive jurisdiction of the sheriff under the acts of parliament in question, a point which had not been raised in the Court below. April 2, 1831.

Lord Chancellor.—In this case I have not troubled the learned counsel for the respondents to enter fully into the merits of the case as they regard the principal matter, because I really do not entertain any material doubt upon the subject. The first question was, whether the feu-contract between Mr. Maxwell and the purchasers conveyed to them the piece of land in question, as it were, out and out; or, whether it only conveyed to them a servitude, as it is called in the Scotch and in the civil law, and what we term an easement? The second question, the alleged exclusive jurisdiction of the Sheriff Court, was the point I wished to have argued, and that not from an inclination against the party, or for the argument—if one can be said to have a judicial inclination,—but I thought it best that it should be argued here, though it had not been argued in the Court below; for it was an observation made by Lord Thurlow, that it was always right to hear the party whom your opinion favoured, if it was a new matter, because sometimes the argument convinced you that you were wrong. But though it does appear to me, when a matter is new, and comes before the Court of Appeal—the Court of last resort—for the first time, it ought to be dealt with upon that principle; yet one always feels very great reluctance to listen to such arguments as appear to have escaped notice in the Court below (the party having the same interest there as here to make resistance), on the ground that in all probability the point was not overlooked, but felt to be untenable. But if ever there was a case where the leaning should be against listening to novelty, it would be in the present, where it cannot affect the merits, but merely the form of the proceeding; and it would be a grievous thing, after all this litigation had been gone through upon the merits, to be obliged, upon technical defects, to send the case back, for no other purpose than to rectify a defect of form. It is still competent to these parties to assert their right in another shape; for nothing now decided will take away the right the party has to claim a close of land. This act is *alio intuitu*. It does not enable the sheriff or jury to settle that question, but merely regulates the proceedings to be had as to the improvement of the neighbourhood. Then, to send it back to be again decided upon the merits (as it must be in favour of the respondent, upon the opinion I have formed, as well as the Court below), would be a grievous evil; and, upon the whole,—though there is some little difficulty arising from the inartificial construction of the act—I shall recommend your Lordships to affirm

April 2, 1891. the judgment of the Court of Session. Then the only other point is upon the words in the conveyance, upon which I cannot say I have any doubt. This is a conveyance of two plots steadings of ground, "with a proportionate part of the waterside grass, " opposite to Clyde street, corresponding to the above steadings " feued, which is to be a common property to the vassals of " Clyde Street in all time coming." That is, that the persons were to have the steadings in severalty, and they were to have the waterside grass in common; they were to be considered as feuars of both, and not as having an easement over the waterside grass; that I take to be the simple meaning of this clause in the conveyance, and that the Court below have found. It is not the grass on the waterside ground; that would be the pasture, and nothing more. It is not any easement or servitude over the waterside ground, but it is "the waterside grass." Then, is it not plain that by this is meant that piece of land commonly called the waterside grass? The question of parcel or no parcel is always a question of fact. You are not to go out of the deed where there is no latent ambiguity, but only a patent ambiguity, in order, by any extrinsic evidence, to clear up a doubt that rises before your eyes upon the face of it. If it is a latent ambiguity—if evidence dehors the deed raises that doubt—you may have recourse to evidence dehors the deed to settle it. That rule is as old as the time of Lord Bacon, when he held the Great Seal; and that rule holds in all the Courts here and in Scotland. But the question of what is meant by a particular expression used to designate the subject-matter of the conveyance—the question of what is meant by waterside grass in this case—is what is called a question of parcel or no parcel, and that is always a matter of evidence. It does not come within the description of a latent or patent ambiguity, but is a matter of description, and that is matter of evidence. I should have been better satisfied if evidence had been produced below to prove that the land in question commonly went by the name of "waterside grass;" that would have removed all doubt; and if I found there was no evidence here to show what was meant by the terms of the conveyance, I should say this was a case for a remit upon that ground; but when I look at the deed itself I see nothing but reason to think that by "water-side grass" was meant the land in question; and I see that, not only from the position in which the land is admitted to lie, but from the way in which the party conveying it has dealt with it in the deed itself—"Waterside grass, opposite to "Clyde Street, corresponding to the above steadings." This of itself, in my mind, is a dealing with it, as if it were descriptive of the piece of ground, and not an easement over the ground. You cannot

April 2, 1831.

say an easement, corresponding with the houses or steadings opposite which it lies, but you can very easily say, the ground opposite those steadings, and opposite which it lies; and if the waterside grass means the ground, the whole is distinct and sensible; but if it means pasturage or servitude of any other description, it is most insensible. If it means general servitude, or if it means all sorts of servitude, bleaching, pasturing, and way-leave, then it is stark nonsense (with all submission to those who entertain a different opinion)—for to talk of a way-leave corresponding to houses opposite to which it lies is plain nonsense; if it means pasturage, it is not such nonsense, but it is not good sense. To talk of a right of pasture corresponding to the steading, or a right of depasturing to that extent, is not a sensible, but a strained and forced construction. Besides, the conveyance bears, “the lands above disposed;” and there is an assignment only of the rents, mails, and duties, though the pasturage might be the subject of rents, mails, and duties;—here would be a defeat of all that part, corresponding with the pasturage, that the waterside grass is said to mean. Then it is said, there is a different warrantice as to the lands and the waterside grass; that he warrants “the lands before disposed at all hands, and against all deadly,”—an absolute warrantice—and then makes personal warrantice of the waterside grass, possibly on account of the difference which he knew had existed in his own actings upon the subject of his own title. But, be that as it may, it is remarkable that there is the word “dispone” going before “waterside grass,” and therefore he is dealing with the waterside grass precisely as upon the original contract, where he gives, grants, and disposes all and hail the steadings, with the waterside grass, as if it came within the description of that disposition. My Lords, one cannot help feeling that a good deal arises in favour of this argument from the position of the land;—it is a small narrow slip, eighteen or twenty yards wide, and one hundred and fifty yards long, in a street in which it is purposed to build steadings. It is a very common expression in all parts of that country to call such a piece of land waterside grass or ground, sometimes black land or stony ground. If it is not under grass, it would be called watersidings or land; if it was sandy ground, it might be called the sands; but if it is grass or sward, it is the ordinary form of speech to call it the waterside grass. When you speak of the waterside grass of the ground, you mean the grazing upon it; but when you say the waterside grass, you mean the ground upon which the grass grows; and I do not think I go too far in saying, in the view I take of it, that a grant of the waterside grass

April 2, 1831.

would pass the ground upon which the waterside grass grew ; and I will state to your Lordships the reasons why I state that. We are much nicer in our descriptions than the Scotch lawyers are ; and yet I shall show your Lordships that even with us the construction contested for would not be a forced one. Lord Coke (lib. 1. cap. 1. sect. 1.) lays it down that if you pass a pasture you must do it in this way :—" If
" a man hath twenty acres of land, and by deed granteth to another
" and his heirs *vesturam terræ*"—that is, the pasture of the ground,—
" and maketh livery of seisin, *secundum formam chartæ*, the land
" itself shall not pass, because he hath a particular right in the
" land ; for thereby he shall not have the houses, timber, trees,
" mines, and other real things, parcel of the inheritance, but he
" shall have the vesture of the land." If it had been the waterside grass of the land or *terræ*, or the grass upon the waterside ground, it would have been the pasturage, and pasturage only. If a man grants to another "*omnes boscos suos*, all his woods, not only the
" woods growing upon the land pass, but the land itself, and by the
" same name, shall be recovered in a *præcipe*, for *boscus* doth not only
" include the trees, but the land also whereupon they grow." So, if a man grant—which comes nearer to this case—all his pastures, it is not the right of grazing, which is a mere easement ; it carries the land on which the grass grows, and upon which there is to be a perception of that pasture. Then he adds, which is stronger still,
" If a man grants *omnes brueras suas*," that is to say, his heath, which Lord Coke says, with his usual love of etymology, comes from the French word *bruyer*, and is called *ros* in the British tongue—by that grant " the soil where heath doth grow passeth, and may
" be demanded by that name in a *præcipe*," which is a writ of right in a real action, and which cannot apply to a right of pasture. When Lord Coke says a *præcipe* shall lie, he means, that the demandant may demand it of the tenant in a real action by a writ of right, and in the case of tenant in tail by a formedon, as if it was land and real estate. There are other illustrations of the same sort, clearly showing, that if such words are not used so as to divest it from the land, and show you are granting the vestures only, the land whereon it is stated the vegetation is growing shall pass. I therefore conceive—and I need not go back so far as the Court seems to have done—that these words in law would be sufficient to carry a feu of what we have here, a narrow strip of land, lying between the water and the houses, called, not the waterside grass of the ground, but " the waterside grass." The words are used as descriptive. One part is called the steading which is not land any more than grass ; the other is called the waterside grass. The

steading is that upon which the house may be built, and the other is that upon which the grass is growing, and which, in other cases, would be called the watersidings or waterside stony ground, or whatever else would better describe it; but as grass grew there, "waterside grass" is used as descriptive. Upon these grounds I am of opinion, without any hesitation, that I ought to advise your Lordships to pronounce a judgment affirming the interlocutor complained of, and dismissing the appeal.

April 2, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—2 Ersk. 9, 14, & 36.

CALDWELL—EVANS, STEVENS, and FLOWER,—Solicitors.

ALEXANDER FRASER, Appellant.—*Lushington—Wilson—Stuart—Robertson.*

No. 20.

Lieutenant-Colonel PATRICK VANS AGNEW, Respondent.—*Lord Advocate (Jeffrey)—Solicitor General (Horne).*

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail was not liable in payment of an account due to a law agent employed by a preceding heir, although by his agency a large part of the estate was restored to the heir of entail.

PART of the entailed estate of Sheuchan having been judicially sold by Robert Vans Agnew, the heir of entail in possession, an action of reduction was raised by his son and next heir substitute, John Vans Agnew, who succeeded to the estate in 1809. To this process he called as defenders, his brother Colonel Patrick Vans Agnew, and the other representatives of his father, as well as the purchasers of the estate.

April 2, 1831.

1st DIVISION.
Lord Corehouse.

After various proceedings, the House of Lords on the 31st of July 1822, and 12th of March 1823*, reversing the judgments of the Court of Session, found that the estate was not attachable for the debts for which it had been sold, that the proceedings were irregular, and therefore that the sales were null and void, and remitted to the Court of Session to proceed accordingly. These judgments were applied on the 17th of May 1823, and a

* 1 Shaw's App. Ca. 320, 333, & 413.

April 2, 1831. question having afterwards arisen with the purchasers as to their right to retain in security of meliorations, the lands were sequestrated, and a judicial factor appointed. The purchasers were however removed at Martinmas 1824, and John Vans Agnew thereupon entered into possession. He died in October 1825, having nominated an executrix, who, as such, had right to his personal funds. Colonel Vans Agnew (who was at this time in India), the next heir substitute, immediately came to this country. John Vans Agnew had, previous to his death, ordered an extract of the decree of reduction, which had been made and partially paid for, but not delivered. The balance of the dues were paid by Colonel Vans Agnew, and he obtained the extract, and was served heir of entail to his father in relation to those lands which had been restored, and in which John Vans Agnew had not been infest.

In the month of January 1829, Mr. Fraser, solicitor in the Court of Chancery, alleging that he had been employed by John Vans Agnew to act as solicitor in the cause while depending in the House of Lords; that he had done so; had been successful in getting the judgments of the Court of Session reversed, and restitution of the lands decreed; that an account had been incurred to him commencing in March 1820 and terminating in July 1823, amounting to 1,800*l.*, and now, with interest, to 2,400*l.*, of which no part was paid, nor could be recovered from John Vans Agnew's personal funds; raised an action against Colonel Vans Agnew on the ground that he had taken benefit from the decree, and was in the possession and enjoyment of the lands, and therefore that he ought to be ordained to make payment of the debt.

Colonel Vans Agnew, besides stating that he had not employed Mr. Fraser, who on the contrary was employed against him; that whatever might be the advantages derived by future heirs from the restored lands, he did not, and could not gain any during his life; that other parties had claims, founded on equal or even stronger grounds of equity with that of Mr. Fraser, which he could not satisfy without involving himself in ruin, pleaded *inter alia*, That as he was an heir of entail, and did not represent John Vans Agnew, he was not liable for any personal contract into which he had entered, nor was it relevant to allege that thereby the entailed estate had been meliorated.

The Lord Ordinary pronounced this interlocutor:—" Finds, April 2, 1831.
 " that the sum pursued for is said to be due for law business
 " performed by the pursuer on the employment of the late John
 " Vans Agnew, the defender's brother: Finds, that the defender
 " does not represent his brother in any respect, except as heir in
 " the estates of Sheuchan and Barnbarroch, held under the fetters
 " of a strict entail: Finds, that it is not a relevant ground for
 " subjecting an heir of entail in a personal debt of his prede-
 " cessor, that the entailed estate was meliorated by the operations,
 " for payment of which that debt was contracted; therefore
 " assoilzies the defender, and decerns: Finds him entitled to
 " expences."

To this interlocutor his Lordship at the same time issued the subjoined note of his opinion:—" This point has been often before
 " the Court, and was fully considered in the late case of (Todd)
 " Moncrieff v. Skene, 14th January 1823, shortly reported by
 " Shaw, 2. 113. In the case of Innes v. the Duke of Gordon,
 " on which the pursuer chiefly relies, the claim of Innes for
 " meliorations was rested on a different ground, namely, that he
 " acted on the faith of a lease which he had reason to believe
 " was effectual under the entail, and therefore, as the *bond fide*
 " possessor of an heritable subject, he was entitled to reimburse-
 " ment. A majority of the Court held, that the lease was a con-
 " travention, and that ne knew, or must be presumed to know,
 " that it was so."

Fraser having reclaimed, the Court *, on the 23d of February 1830, adhered.†

Fraser appealed.

Appellant.—The Court below have misapprehended the ground on which the present claim was made against the respondent.

† 8 Shaw & Dunlop, 585.

* *Lord President* observed, Is it meant to be maintained that if Mr. John Vans Agnew had paid this debt to Mr. Fraser, he (Mr. Agnew) would have had a claim of relief for the amount against the next heirs of entail? If he could not have had such a claim, how can his agent have any better?

Lord Balgray.—It is a very hard case, I must say.

Lord Cragie.—The only view that occurred to me possible to take, in support of Mr. Fraser's claim, is founded in justice.

Lord President.—The purchasers who have had their estates taken from them, might come forward on the same ground.

April 2, 1891. They appear to have thought that it was rested on the personal contract of John Vans Agnew, and directed against the respondent as his representative; whereas the claim is made against the respondent, not in that character, but in respect that he is the

Lord Gillies.—They have a much better claim in equity than Mr. Fraser has here.

Lord Cragie.—My Lords, what I was going to state is, that it has been held by the Court in some cases, that the heir in possession has the character of trustee for the other heirs of entail; and it has been decided, that the heir in possession, by combining with the next substitute, may bar the rights of the remaining heirs. This has been found in cases of prescription, where the remoter substitutes were found not entitled to deduct their minorities. And if it could appear that the heir in possession was to be considered as acting as trustee, then he might have a claim of relief in a case like this. For my part, however, I confess that I never agreed in that doctrine, and never could see any ground for implying a trust of this kind in entails. All the heirs of entail have separate interests and rights, and each of them must act for himself. I regret in this case, that Mr. Fraser cannot get redress. He might have had title-deeds in his possession, by retaining which, he might obtain indemnification; but he appears not to have been possessed of this means of securing payment.

Lord President.—I have no doubt at all. The original contract between Mr. John Vans Agnew and Mr. Fraser, was nothing more than a personal contract. In taking the employment, Mr. Fraser had nothing but the personal obligation of Mr. Agnew to trust to, and he took his risk of this being fulfilled by Mr. Agnew himself. And when he looked to the purpose and object of the action, Mr. Fraser must have seen this. It was not an action to obtain this estate for Mr. Agnew himself, or in which he had the sole interest. His interest was of a qualified nature, so that the moment Mr. Agnew died, the whole interest, as to him or his representatives, was at an end. When you come to the true question here, it is just this: that if the heir, by recovering this estate, would have been entitled to make the expences a debt against the estate, then Mr. Fraser is entitled to the benefit, and may claim against the heirs; but if it be merely a personal obligation, as I apprehend it to be, which could not be made a debt, and which Mr. Agnew, if he had paid it, could not have made effectual against the estate, we cannot find the defender liable here. Therefore, however much I regret it, yet I cannot find principles on which to bottom a judgment for Mr. Fraser.

Lord Gillies.—I am of the same opinion with your Lordship, and on the same principles. This point was extremely well considered in the case of Innes, and that case was really a stronger one than the present; for there the claim was for meliorations made on the property, by which the entailed estate was benefited and increased, and there might be ground for saying that that should form a debt against the estate and the heirs. But here the entailed estate is not improved at all, and the claim is not made on that ground.

Lord President.—In the cases of (Todd) Skene and Dundas, and Hamilton of Pentcaitland, the entailed estate was benefited, whether the law-suit was lost or won.

On the point of expences,

Lord Balgray.—I really think, especially in a case like this, that there is no ground for expences.

Lord President.—I would have thought so too, if this had been the first case of the kind: but the point has been repeatedly settled in former cases.

Lord Gillies.—I hold the point to have been clearly settled by former decisions.

proper debtor, directly and immediately liable as having been April 2, 1831. lucratus far beyond the amount sued for, by the exertions, professional skill, and pecuniary advances of the appellant. The claim is founded on the principles of recompense which, according to the authority of Stair, Bankton, and Erskine, creates a direct personal liability against a party who has been made locupletior by the acts and deeds of another. In such a case the rule is, that the party is responsible, independent of contract altogether, in quantum locupletior est. But the restored lands of which the respondent is in the enjoyment yield a rental of at least 3,000*l.* per annum, while the debt sued for does not exceed 2,400*l.* Against such a claim the plea of being an heir of entail affords no answer, and accordingly, in the case of Innes the majority of the Court were of opinion, that if the claim had not been excluded by mala fides, the heir of entail would have been responsible. But in the present case the appellant acted in optima fide, and there is no allegation to the reverse.

Lord Chancellor.—How can you support this appeal? It is not very creditable that there should be any refusal to pay Mr. Fraser's bill; but we must go by the law. The heir of entail is a stranger to Mr. Fraser, or any contract that may have been made with him. There is no privity between them. The case of *Fraser v. Fraser*, decided this session, settled this very point.

Dr. Lushington.—Of course, it is not our wish or intention to argue against any decided cases. But in this one there is great hardship.

Lord Chancellor.—There ought to be an end of arguments upon a point decided over and over again; and with respect to the hardship, what can be harder than the cases of leases? Suppose the case of a tenant, who enters upon an estate upon a lease for ninety-nine years; he lays out 40,000*l.* upon the improvement of the property, and the lease is afterwards found void; the next substitute heir of entail gets into possession by setting aside the lease, obtains the benefit of every farthing that has been expended, and the lessee has not a claim for a sixpence. Mr. Fraser's case is a very hard one, peculiarly hard. Indeed this is like a case of salvage. The subject matter has been saved. I know very well what a man of honour ought to feel upon the subject, whatever the feelings of a lawyer may be; and I hope that will be considered. Mr. Fraser has the strongest claim of an equitable nature, which means in Scotland, not what equitable means in this country, but of an honourable

April 2, 1831. nature. If Mr. Vans Agnew stands upon his rights, he ought to consider to whom he owes the estate.

Mr. Solicitor General.—If this claim were admitted, there are others of the same nature to a greater extent than the property itself.

Lord Chancellor.—But a claim of salvage stands in a very preferable situation. Mr. Fraser is the person to whom Mr. Agnew owes the estate. Recollect how much depended upon the discussion at the Bar of the House; and the reversal of the judgment below is not to this moment acquiesced in by the law authorities of Scotland. If it had been left to them, Mr. Vans Agnew would not have had a farthing; but Mr. Fraser takes the matter up, and rescues the estate from the fangs of the decision in the Court below—for that is really the case—and gets it back again. It is saved in consequence of what was done here at the expence of Mr. Fraser. If I were Mr. Vans Agnew I would pay Mr. Fraser, if I did not pay any body else.

The Lord Advocate.—It is impossible to deny that this debt is due, but it ought not to fall entirely upon the present possessor.

Lord Chancellor.—If it could be done it ought to be distributed over the heirs *ad infinitum* in succession, because whoever may succeed Mr. Vans Agnew is just as much benefited as he is himself by Mr. Fraser's expenditure; still if the estate is 3,000*l.* a-year, as I understand it to be, Mr. Vans Agnew ought not to grudge it, though he pays the expence for the future heirs. Every owner lays out money for the benefit of future heirs by any improvement he may carry into effect. Upon the principles of justice this is as near an entailor's debt as it can be. It is so strong a case for burdening the estate that it is a wonder an estate bill has not been applied for, if there is much debt of the same kind. The money out of pocket ought at all events to be repaid. Their Lordships who with me heard the cause both observed that they never knew a stronger case of a debt of honour. I hope that will be considered—it is impossible to intimate a stronger opinion—I hope that will be considered by this gentleman, an officer in the army; but on the law the point is fixed, and we cannot help it. We must dismiss the appeal, and confirm the interlocutor, but without costs.

On a subsequent day the Lord Chancellor observed,—It has been communicated to me, that, for a purpose which neither my noble friends nor myself could have intended, a very improper use has been made of some observations made by the noble Lords present and myself, in disposing of the case of *Fraser v. Vans Agnew*,—that they have been turned into the means of applying a kind of pressure which it is certainly not the business of this House to employ.

There was no stigma cast upon the conduct of the respondent for not having done that which, having done, might have operated his entire ruin. If he, the heir substitute, and against whom no demand lies personally, once yields to a claim of *right* in one, two, three, or four cases, he may yield to all the others, till the whole property is exhausted; and that certainly could not have been the intention of the noble Lords or myself. What we said was, that the respondent, having a right in law, is quite entitled to resist the claim. But there is a peculiarity in Mr. Fraser's situation; and that we wish to submit to Colonel Vans Agnew's consideration; and he, being a man of honour and a gentleman, is likely to feel—for that is the way in which it was put—the strong and eminent claim of Mr. Fraser, and which applies to Mr. Fraser alone—that Mr. Fraser had a sort of salvage claim—that is the very expression I used: he saved the estate by the money which he expended out of his own pocket, which estate would otherwise have been lost in consequence of what this House determined to be a wrong decision below. The others are common debts, which he is no more liable to than a remainder-man in England would be liable to the repayment of money expended for the benefit of the estate; he is just in the same situation — there is no privity between him and his immediate predecessor — so, in the case of Colonel Vans Agnew, no human being has a *right* to come against him; and if he gives any thing, it is out of his own sense of fairness towards the appellant: paying Mr. Fraser does not entitle any one human being to come against the respondent.

I am sorry what passed was made the ground of very improper constructions against Colonel Vans Agnew's conduct,—constructions which were by no means consistent with the intention of my noble friends or of myself. Still we cannot be surprised that Mr. Fraser and those who are acting for Mr. Fraser feel very strongly upon the subject; it is a very hard case upon him.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities. — 1 Stair, 8, 1 to 8; 1 Bankton, 9, 1 to 4; 3 Ersk. 1, 11; Innes, Dec. 21, 1827; (6 S. & D. 279, and Nov. 10, 1830, ante Vol. IV. 305); 1 Stair, 9, 9; 1 Bankton, 9, 45; Paterson, June 4, 1824; (3 S. & D. 103.)

Respondent's Authorities. — Dillon, Jan. 14, 1780, (15,432); Webster, Dec. 7, 1791, (15,439, and Bell's Cases, No. 7, Entail); Tod, Jan. 14, 1823, (2 S. & D. 113, affirmed May 27, 1825, ante 1, 217); Fraser, May 29, 1827, (5 S. & D. 722; affirmed Feb. 25, 1831, ante 5.)

HORE—RICHARDSON and CONNELL,—Solicitors.

No. 21.

CLAUD RUSSELL, Campbell's Trustee, Appellant.—
Pemberton—P. Robertson.

EARL OF BREADALBANE, Respondent.—*Tinney—D. Mac Niell.*

Assignment—Partnership—Tack.—Circumstances in which held (affirming the judgment of the Court of Session) that an assignation of the share of company stock, consisting of leases, had been effectually transferred.

Right in Security—Retention.—Held, (affirming the judgment of the Court of Session,) that an *ex facie* absolute assignation of the share in a company, qualified by a declaration in a back bond, that it was granted in security of a specific debt, entitled the assignee to retain in security of a general balance arising on other debts subsequently contracted.

April 4, 1891.

THIS was the sequel of the case reported *ante*, I. 621.

2D DIVISION.
 Ld. Mackenzie.

On the 13th of March 1745 a co-partnery was formed, for working quarries at Easdale, under the name of the Marble and Slate Company of Nether Lorn, and on the 23d of May 1748 Lord Glenorchy granted two leases to the partners of that company. Eventually Colin Campbell of Carwhin and John Campbell, cashier of the Royal Bank, Edinburgh, became the sole partners. The son of Campbell of Carwhin succeeded to the estates of Lord Glenorchy and the earldom of Breadalbane, and also to his father as a partner in the company. He was thus the landlord of the company, and also one of the two constituent partners. The business of the partnership was carried on by an overseer at the quarries, who superintended the workmen and managed the business generally, while the cash department was confided to the partner, John Campbell, who resided in Edinburgh; he was also agent and manager of the Earl's estates. In March 1813 Campbell obtained, for his accommodation, two bills from the Earl, one for 5,000*l.*, and the other for 1,000*l.*; and in security of the Earl's relief, Campbell, on the 23d of June thereafter, executed an *ex facie* absolute and unqualified conveyance of “his interest or share in the stock and effects of
 “the Marble and Slate Company of Netherlorn, with all profits
 “or dividends arising therefrom, from and after the 11th day of
 “November last, or from whatsoever day may happen to be the
 “date of the last annual balance of accounts of said company,
 “and all right, title, and interest which he (John Campbell)
 “had thereto, or to the said profits or dividends, or to the tacks,
 “subjects, stock, utensils, instruments, tools, and other imple-

“ments and effects whatsoever, belonging or that may belong April 4, 1831.
 “to the said company, with the contracts or article of agreement
 “of the said company, and tacks, leases, prorogations, and other
 “writings belonging to them, in so far as he had any right or
 “title thereto.” On the other hand, the respondent granted
 a back bond, declaring that the deed of assignation had been
 granted to him “in trust, and for my relief and indemnity of the
 “said cautionary obligations (the bills already mentioned), come
 “under by me, on account of the said John Campbell or his fore-
 “sails, and whenever the said John Campbell or his aforesails
 “shall relieve me of payment of the bills above mentioned, if the
 “same be put into circulation, and of the payment of all other
 “bills which I may hereafter accept, without value, or on his ac-
 “count, and for his accommodation merely; and of all damage,
 “interest, and expence which I may have been put to in regard
 “to the said bills, as cautionary engagements; or whenever I
 “shall recover payment of the same from him, and of all charges
 “and expences incurred in relation to the premises, in any
 “manner of way; I, the said John Earl of Breadalbane, do
 “hereby bind and oblige me, my heirs, executors, and suc-
 “cessors whomsoever, on the expence of the said John Campbell
 “or his foresails, to denude of the foresaid trust-conveyance,
 “and to retrocess the said John Campbell and his foresails
 “in their own right and place of the premises; declaring, that I
 “am not to be liable any farther than for my actual intro-
 “missions by virtue of the conveyance aforesaid; and that I am
 “not to be liable in diligence, nor for omissions of any kind.
 “But declaring, that I shall be obliged, as I hereby bind and
 “oblige myself and my foresails to account to the said John
 “Campbell and his foresails, for all sums of money which I
 “actually receive in virtue of this conveyance, beyond the
 “foresaid principal sums of 5,000*l.* and 1,000*l.*, and interest,
 “&c.”

The bill for 1,000*l.* was retired by Campbell, but the Earl was obliged to pay the one for 5,000*l.*

The deed of assignation was delivered, at the time of its execution, to the Earl, but nothing farther took place till 1818. In that year Campbell was indebted to the Earl, as managing his estates, in upwards of 10,000*l.*, and announced his inability to pay the amount. In consequence of an arrangement made for

April 4, 1831. the purpose (as was alleged) of effectually securing the Earl, Campbell intimated, on the 28th of May, to the overseer, that the bills were in future to be drawn payable to the overseer's order at the Royal Bank, and to be blank indorsed by him. A copy of this letter was transmitted by Campbell's son (John Archibald Campbell, W. S.) who had been employed by the Earl as his law agent, and explaining, that the bills which were formerly payable to his father, after being accepted by the purchasers, were to be made payable to the overseer, and indorsed by him to the Royal Bank, who would draw the proceeds, and retain them till farther orders. The overseer acknowledged receipt of the letter of the 28th of May; but the arrangement not proving satisfactory to the Earl, he wrote, on the 2d of June, to John Archibald Campbell, a letter of which no copy was preserved, but to which the following answer was returned on the 6th: " My Lord,—I have the honour of your Lordship's
" letter of the 2d, which I shall have the honour of answering in
" a day or two. Meantime beg to intimate, that Mr. Clerk,
" advocate, will point out the steps necessary to be adopted
" for your Lordship's complete and exclusive interest in the
" quarries, to prevent any obstruction from the other creditors;
" and if any thing is necessary, these steps shall be immediately
" adopted. The disposition in favour of your Lordship was pre-
" pared under the advice of the first counsel, and, I should
" suppose, was all that was necessary, you being entitled to enter
" into possession whenever you please, and the form of doing
" this will be pointed out by Mr. Clerk. In the meantime, the
" money that may come in will be lodged as your Lordship
" directs, in your own name, for the quarry, at the Royal
" Bank." The Earl had also directed his factor, Duncan Campbell, to require the overseer to take the bills payable in future to the factor. In consequence of this the overseer wrote to John Campbell, stating, that " Lord Breadalbane's
" factor called here this morning, and intimated his Lordship's
" wishes, that the bills were to be drawn in future payable to his
" Lordship's factor. To this I answered, that I would write
" you on the subject. You will please, therefore, send me the
" exact form you wish, and the kind of indorsation, to prevent
" any inaccuracy hereafter, as I find myself at a loss how to
" act till I hear particularly on the subject." On the 18th

John Archibald Campbell wrote, in answer to the overseer, that "My father will himself write you about Easdale; in the meantime I beg to mention to you, that the bills are all to be payable and drawn in favour of Mr. Duncan Campbell," who was the respondent's factor. April 4, 1831.

Accordingly all the bills drawn after the 31st of May were taken payable to the factor, and delivered to him, and accounts were opened with banks at Glasgow and Leith (where several of the acceptors resided), in the Earl's name simply, and also one with the Royal Bank, which was entitled "The Earl of Breadalbane for Easdale Company." Payments were drawn by the factor, and the Earl operated on the accounts by orders in his own name.

On the 26th of June a notarial intimation of the assignation was made to the overseer; and, as this was considered to be defective in form, another intimation was made on the 31st of July.

Campbell was rendered bankrupt on the 21st of August 1818, and having executed a disposition in favour of Claud Russel, accountant, in trust for behoof of his creditors, he brought an action of reduction of the assignation on the acts 1621 and 1696, but relying chiefly upon the latter, in respect that intimation had not been made till within sixty days of the bankruptcy. Lord Pitmilley, upon this latter ground, decerned in terms of the libel, and the Court, on the 3d of December 1822, adhered to this interlocutor: "In so far as it finds, that in respect the granter of the conveyance, or assignation challenged, was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, the assignation was not completed to the effect of giving a preference to the assignee, in a question with the creditors of the cedent; but before answer, remit to his Lordship to hear parties further on the conclusions of the libel, and do as he shall see cause."

The Earl having appealed, a remit was, on the 28th of June 1825 *, made, "to review generally the interlocutors complained of in the said appeal; and in reviewing the same, the Court is especially to consider, how and to whom intimation

* Ante, I. 621.

April 4, 1831. “ of the assignation ought to have been given. And it is further
“ ordered, that the Court, to which this remit is made, do
“ require the opinion of the Judges of the other Division, in the
“ matter and question of law in this case, in writing, which the
“ Judges of the other Division are so to give and communicate
“ the same ; and after so reviewing the interlocutors complained
“ of, the said Court do and decern in the cause as may be
“ just.”

Under this remit, the following opinion was delivered by the Lords President, Balgray, Craigie, Gillies, Cringletie, Meadowbank, Mackenzie, Corehouse, Medwyn, and Newton, being the consulted Judges: “ In consequence of the investiga-
“ tions which have taken place, and the productions which
“ have been made in this case since it returned from the
“ House of Lords, we think that the question as to the mode
“ of completing an assignation to a lease does not arise in it.
“ For it appears, that the predecessors of the parties in this
“ case, along with other persons, entered into a copartnery
“ (13th March 1745), under the name of ‘ The Marble and
“ Slate Company of Nether Lorn.’ On the 23d May 1748
“ Lord Glenorchy granted two leases of certain subjects to
“ the partners nominatim, ‘ who, by contract, bearing date
“ 13th March 1745, have all entered into copartnery, under
“ the name and title of ‘ The Marble and Slate Company of
“ Nether Lorn.’ Two of these partners, Colin Campbell of
“ Carwhin, and John Campbell cashier of the Royal Bank,
“ having acquired the shares of the other members of the com-
“ pany, thus became the only partners ; and it appears that the
“ two leases, which would expire in 1801, were, by a deed,
“ dated 6th March 1771, prorogated by the landlord to them
“ equally, their heirs and assignees, for the space of two nineteen
“ years. By an agreement, dated 23d March 1771, on the
“ narrative of the prorogation of the two tacks, and evidently
“ as a part of the same transaction, the two parties, Carwhin
“ and John Campbell, prorogated and prolonged the contract
“ of copartnery for the like term of two nineteen years, ‘ to
“ quadrate and agree with the said prorogation.’ Lord Breadal-
“ bane, the son of Carwhin, and Mr. John Campbell, the son of
“ the other partner, were, in 1813, the only partners of the
“ company possessing under the prorogated tacks ; and the

April 4, 1831.

“ interest of each partner in it was merely the share of the
 “ profits he was entitled to draw as a partner. On 23d June
 “ 1813 Mr. Campbell accordingly granted an assignation of
 “ his ‘ interest or share in the stock and effects of The Marble
 “ and Slate Company of Nether Lorn,’ in favour of Lord
 “ Breadalbane, assigning his interest or share, from and after
 “ Martinmas 1812, in security of certain sums advanced to
 “ Mr. Campbell. Lord Breadalbane did not immediately act
 “ on this assignation; but he states, that on 2d June 1818 he
 “ gave notice, by a letter of that date, to Mr. Campbell’s son,
 “ that he was now to avail himself of the assignation; and he
 “ desired the money, received in payment of the bills drawn for
 “ sales at the quarry, to be paid into the Royal Bank in his
 “ name for the quarry, instead of being received by Mr. Camp-
 “ bell as formerly. Mr. Campbell jun. acknowledged the receipt
 “ of this letter on the 6th of June. Lord Breadalbane’s letter is
 “ not produced; and the creditors do not admit that the above
 “ was the import of it, though there seems to be strong pre-
 “ sumptive evidence of it, both from the terms of the answer of
 “ the 6th June, and because immediately afterwards Mr. Camp-
 “ bell did give notice to the manager at the quarry, that the
 “ mode of drawing the bills was to be changed; and a new ac-
 “ count was also immediately opened with the Royal Bank, in the
 “ name of the Earl of Breadalbane, for the Easdale Slate Com-
 “ pany; so that, either by the letter of the 2d June, or by some
 “ other communication, verbal or written, it is plain that notice
 “ was given to the above effect, and that a corresponding change
 “ of possession took place, which gave full effect to the assigna-
 “ tion 1813. Therefore we hold this to be all that was neces-
 “ sary to secure to one of the partners the share of the stock
 “ belonging to the other partner which he had previously
 “ assigned to him, being of opinion that the legal form of in-
 “ timation is not necessary to complete an assignation, whereby
 “ one of two partners assigns his share in the company’s stock
 “ to the other. The notice here given was necessary, only
 “ because the assignation had not been operated upon at first,
 “ which made it necessary to intimate, that the right under it
 “ was for the future to be made available; and, for this purpose,
 “ such notice was sufficient. But in this case the transfer is still
 “ farther unchallengeable, as the notice was followed up by Lord

April 4, 1831.

“ Breadalbane obtaining possession of all bills after that date
 “ made payable to the company, as well as the proceeds of such
 “ as were then in the circle, as is established by the letter and
 “ memorandum of 29th June 1818. The notice of 2d June
 “ 1818, and the possession following upon it, were prior to the
 “ sixty days preceding Mr. Campbell’s bankruptcy, which took
 “ place only on 21st August 1818; and therefore we consider
 “ Lord Breadalbane’s right to Mr. Campbell’s interest or share
 “ of the stock of the company, subsequent to the above notice,
 “ unchallengeable at the instance of the other creditors, who
 “ have no title, either by diligence or otherwise, to compete with
 “ this assignation.”

On advising this opinion *, the Court, on the 3d of July 1827, altered the interlocutor appealed from; repelled the

* *Lord Justice Clerk* observed, Judgment must of course be pronounced in conformity to the opinion of the consulted judges; but I am not prepared to assent to all the propositions contained in that opinion. I have the greatest repugnance to the transference of the share of a partner kept concealed from the world, the partner being allowed to go on with the management. Suppose the company had been involved in ruin, could this man have been relieved of his liability by what has taken place? In such a case the Court would be obliged to determine whether something more was not necessary to transfer than a simple assignation. Then as to the supposed change of possession, it rests on a very narrow basis. It may have been a very convenient arrangement, but I can see no change of possession, or such a transference as in my opinion the law requires.

Lord Glenlee.—I acquiesce so far in the opinion as to think that there are here no termini habiles for determining the question, whether intimation is necessary to complete an assignation to a lease. There are two reasons for intimation in transference of this description,—one to put the party in malâ fide, which does not occur here, and the other to the manager, which is an act of possession of the right, and the only one which in many circumstances can be had. Now, I cannot conceive a right that does not require either actual possession or intimation; and the question here is, whether there was such actual possession as to vest the right? There was no doubt a possession, but I have a difficulty in ascribing it to the right. If I bring a quantity of grain into a cellar, and intimate to the keeper of the cellar that he is to hold it for me, that puts him in malâ fide to give it to another, and it is an act of possession; but if he sends me some bolls of it, that is no act of possession, and does not complete the transference. In the same way here, though the bills going into Lord Breadalbane’s possession were transferred, that did not necessarily transfer the right. On the whole, I have a certain degree of difficulty in concurring with the opinion.

Lord Pitmilley.—If this case comes to be quoted as a precedent, I can hold it to decide nothing but what is stated in the first sentence of the opinion; and I still think that in a question with creditors a transference of a lease retenta possessione is not good.

Lord Alloway.—I concur with the consulted judges. There is no person to whom the assignation could have been intimated; there were only two proprietors, and there is no instance of an intimation to servants in order to transfer property.

reasons of reduction, “ except in so far as it is alleged that the
 “ conveyance brought under challenge was granted in trust and
 “ security only, and to a limited extent; remit to the Lord
 “ Ordinary to hear parties further on that allegation, and do as
 “ he shall see cause; but, quoad ultra, assoilzie the defender
 “ from the rescissory conclusions of the libel; find no expences
 “ due, so far as hitherto incurred.” *

April 4, 1831.

Under this remit the Earl maintained, that as he had an unqualified assignation to Campbell's share, he was entitled to retain it in liquidation, not only of the 5,000*l.*, but also of all other debts contracted and due to him by Campbell posterior to the date of the assignation. On the other hand, the trustee maintained, that as the assignation was qualified and restricted by the back bond, the assignation could not be extended to any other debt than that in respect of which it had been granted. The Lord Ordinary found, “ that the defender (the
 “ Earl) has right to retain possession of the share in the Easdale
 “ concern libelled, until all the debts due to him by Mr. John
 “ Campbell, and contracted after the date of the assignation of
 “ the said share, shall be paid;” and assoilzied the Earl from the declaratory conclusions of the libel, and found him entitled to expences. He also issued the subjoined note of his opinion.† The trustee reclaimed, but the Court‡ on the 18th of June 1829 adhered. §

Russell appealed.

Appellant.—1. The deed of assignation in favour of the respondent being a conveyance of Campbell's right to certain

* 5 Shaw and Dunlop, 891.

† “ The Lord Ordinary conceives that it is not possible to view this as a case
 “ of a right in security, limited by its own nature, and incapable to afford a title of
 “ right to more than is sufficient for the payment of the debt secured. In this case
 “ the assignation is not limited. It warrants entire possession in the share of the
 “ concern, and that simply and absolutely; and accordingly the back bond binds
 “ the defender to reconvey and account for the profits. It does not seem to the
 “ Lord Ordinary possible, without contradicting the principle established by a series
 “ of decisions, to find that the defender is bound to reconvey and account, without
 “ notice of the debt afterwards incurred to him by Mr. Campbell.”

§ 7 Shaw & Dunlop, 767.

‡ Lord Justice Clerk observed, I expected a greater attempt would have been made by Mr. Russell to draw a distinction between this case and those cited by

April 4, 1831.

leases, or alternatively a conveyance of Campbell's interest in a society whose property consisted of leases, could not be rendered effectual, except by possession either natural or civil on the part of the respondent. But the facts of the present case show that there have been no possession; and accordingly the respondent was so satisfied of this, that, acting under the advice of counsel, he attempted to make his right real by intimation of the assignation in June and July 1818. This, however, was quite unavailing, both in itself and because it took place within sixty days of the bankruptcy, and consequently fell within the statute 1696.

2. As the assignation was granted expressly in relief of two obligations specially mentioned in the back bond, the respondent cannot make use of that assignation as a security for the general balance due to him by Campbell. It may be true, that in questions with third parties, or in relation to heritable rights, the qualifications of a back bond may be ineffectual; but this is a question with the assignee and granter of the back bond, and relative to a right of a personal nature. The case, therefore, must be judged of as if the qualifications of the back bond appeared on the face of the assignation, and in such a case it is undoubted that the respondent would not enjoy a more extensive benefit than that which appeared from the terms of the deed itself.

Lord Breadalbane; for otherwise, the principle being laid down in those cases that where the conveyance is out and out, though with a back bond, effect must be given to it, even as to subsequent advances, we cannot alter the interlocutor without going in the face of those decisions, which, notwithstanding the ingenious argument on the part of Mr. Russell, I cannot feel myself warranted to do. A case, it is true, occurred this session, where goods deposited by a party in possession of them were held not subject to retention for future contractions (*Stuart & Fletcher*, May 19, 1829, 7 S. & D. 622.) That arose, however, from the circumstance, that the deposition was for custody alone, and no other purpose; and I think that case steers clear of those quoted by Lord Breadalbane; and although I felt a difficulty in that case, I am for adhering in the present.

Lord Glenlee.—I rather think the interlocutor right.

Lord Pitmilley.—I also think that this case must be ruled by those already decided, and in particular by the case of *Admiral Maitland* (Nov. 23, 1827, 6 S. & D. 109.), which has so fixed the matter that it is impossible to get over it. Were it not for it, however, I should have had great doubt, considering that this is not a question with third parties, but with Lord Breadalbane himself, competing with other creditors in the face of his own back bond.

April 4, 1831.

Respondent.—1. The respondent stands in a double position. He is, with reference to the leases, the landlord, and is also a partner in the stock of the company. The leases form part of that stock, and the question relates mainly to the transfer of Campbell's share of the stock. But in either view the right of the respondent was complete prior to the sixty days preceding the bankruptcy. The delivery of the assignation was in either case sufficient. In relation to the transaction as one between landlord and tenant, it was a direct yielding up of the possession by the tenant to the landlord, and it would have been absurd for the respondent to have gone through the ceremony of intimating the assignation to himself. Again, with reference to the share of the stock, the delivery also operated a complete transfer; for as the respondent and Campbell were the only partners, and they could not fail to be aware of the deeds to which they themselves were parties, any farther intimation, either to the one or to the other, would have been idle. Neither was there any necessity for intimation to the overseer, who was merely the servant of the respondent and Campbell; and he could have done nothing more than have made them aware of what they already knew perfectly, that the share had been transferred. But in fact there was actual possession by the respondent, independent of the mere delivery, more than sixty days prior to the bankruptcy.

2. It has been settled by a series of decisions, and especially by the case of Maitland, that an ex facie absolute disposition or assignation, although qualified and restricted by a back bond, entitles the disponent or assignee to hold possession, not only in security of the sums originally advanced, but also of those subsequently contracted. This rests upon the plain principle, that the bankrupt, or any other person in his right, cannot insist on being reinvested till he shall do justice by repaying those advances which have been made in reliance on the security thus created.

Lord Chancellor.—My Lords, this case, if it were to be made the ground of laying down a general rule of law, or any general doctrine touching the right of making assignments, would rise into one of much more importance than now belongs to it. The noble

April 4, 1831.

and learned Lord *, now no more, who advised your Lordships when the case was last before the House, seemed to take this view of the case. He thought that the learned Judges of the Court below had not sufficiently attended to some of the points which he wished to have brought before them, and which by the judges of the Second Division had not been considered; and he remitted it to that Court for review, and for the opinion of the judges of the other division.† That opinion has been taken, and the consulted judges have entirely agreed with their brethren ‡, not raising the question of disputed law, but avoiding it, and applying the admitted law to the facts. Upon looking into their opinion upon the facts and circumstances of the case, and the opinion of the judges from whom the appeal was first brought, I feel entirely satisfied with the judgment pronounced by them. I do not deal with the general proposition, either that intimation is necessary or unnecessary, or that possession is necessary or unnecessary; and not feeling called upon to deliver my opinion upon those points at all, this judgment of your Lordships will only have authority in cases where the circumstances — where the *species facti* may be the same with the circumstances or *species facti* in the present case. I observe, however, that a very great difference exists in the ground taken on the part of the appellant here from that which he took in the former case. Intimation was clearly referred to in the judgment of the Lord Ordinary in the Court below, and in the judgment pronounced by Lord Gifford — where he intimates a strong opinion against the judgment then appealed from, and he desires the Court to say to whom the intimation should be given, clearly showing that intimation appeared to him to be no immaterial part of the proceeding. I understand that to be abandoned; for when they are asked, if an intimation was necessary, to whom it should be given, they naturally felt the pressure of the consideration that the landlord would be the person—but the assignee here being the landlord, and having intimation, from the relation in which he stood to the other party, they abandon the question of intimation, and say they will not raise it. If they did, here is the intimation, from the accident of Lord Breadalbane being the landlord. Then they say that there must be possession. Now, without going into the details of the case, I hold in this case enough passed, either in the situation of Lord Breadalbane as landlord, who has necessarily intimation, or in the circumstances that took

* Lord Gifford.

† 1 Wilson and Shaw, 621.

‡ 5 Shaw and Dunlop, 891.

April 4, 1881.

place between the parties after the assignment, and the other circumstances referred to by the unanimous opinion of the ten learned judges, to bring this case within all the requisites laid down by the Court of Session in the first instance, and laid down and recognized by the consulted judges in the second instance, and to complete the title as against the creditors of Campbell the assigner. The case of Brock has been very much pressed upon your Lordships at different parts of this discussion—both at the former and the present stage. If that had been an unanimous decision, or any thing nearly unanimous, and had been acquiesced in as a decision that stood upon contrary principles to former cases, I should have thought it had great weight, provided the facts of this case were such as to require me to decide that point; but as I think they do not require me to decide that point, the case of Brock becomes comparatively unimportant. Nevertheless, beside the circumstance of it being under appeal at this moment, I must say, there is the narrowest possible majority in support of the rule laid down,—the President, Lord Meadowbank, Lord Mackenzie, Lord Corehouse, Lord Moncreiff, and Lord Newton making six for it, and Lord Eldin, who, if I see distinctly, is against that part of the judgment which requires possession; Lords Balgray and Gillies protest against it; Lord Craigie delivers a long and elaborate judgment opposing it; and Lord Fullerton delivers an equally elaborate judgment, coming to a different conclusion from the last; so that here are six to five—a bare majority in favour of the doctrine; and I cannot avoid reminding your Lordships that the learned counsel at the bar, following the way in which the doctrine is treated below, do not maintain that natural possession is required, which the text-writers require, but natural or civil possession only. Now, I understand the natural possession of an assignment, from dealing with it; but I am not so sure that I understand civil possession, unless by civil possession is meant intimation, and then I understood that too; and there is a passage in the report of the case which inclines me to think it may mean that. It looks as if they thought that intimation constituted civil possession; but I do not consider it necessary for me to say that I approve of the case of Brock any more than that I doubt it, or disapprove of it. That case will come to be heard before your Lordships in the course of the paper; and if the question there arises—stripped of the special fact—whether, by the Scotch law, possession is necessary; and if so, what kind of dealing and of intimation constitutes civil possession—what kind of intimation is necessary and sufficient; and if possession should be necessary, whether that kind of inti-

April 4, 1831. mation is sufficient to transfer against other successors the right of assignment—this House will decide that question; but that question of law does not appear to me to arise in the present case. The other ground, as to what this assignation will cover, I hold to be decided by a constant series of adjudged cases; and I can see no reason why we should not adhere to them. I shall therefore move your Lordships that the interlocutor appealed from be affirmed, without costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities. — (1.)¹—3 Ersk. 5, 5, 6; Syme's Trustee, May 23, 1806 (No. 13, Appendix, Tack); 1 Bell, 67; 2 Ersk. 6, 25; 3 Stair, 2, 6; Kelk. 45; 2 Bell, 11; Douglas, June 6, 1794 (2802); Yeoman, Feb. 2, 1812; Brock, Nov. 29, 1822, (2 S. & D. 52, and 3 W. & S. 75), and March 5, 1830, (8 S. & D. 647; Watson, Nov. 19, 1750 (850.))

Respondent's Authorities. — (1.)—3 Stair, 1, 9; 3 Ersk. 5, 4; 2 Bankton, 193.— (2)—3 Ersk. 4, 20; Brough's Creditors, Nov. 26, 1793 (2585); Dougall, June 11, 1794 (Bell's Cases, 41); Robb's Creditors, June 7, 1808 (No. 5, Appendix, Compensation); Maitland, Nov. 23, 1827 (6 S. & D. 109); 1 Bell, 5.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

MAXWELL and Co., Appellants.—*Mr. John Campbell—
Mr. Sandford.*

No. 22.

STEVENSON and Co., Respondents.—*Mr. Serjeant Spankie—
Mr. P. Robertson.*

Sale.—Statute 6 Geo. IV. c. 112. Where grain, situated in a bonded warehouse, was sold by the occupier to another, who ordered it to be transferred to an agent, making an advance on the faith of it; and the seller delivered his set of the keys to the agent, the other set remaining with the revenue officer: Held, (reversing the judgment of the Court of Session,) that, although no written agreement of transfer had passed between the seller and buyer, and no entry was made in the books of the revenue officers, yet complete delivery had been made to the agent, and that the above statute did not apply.

By the 82d section of the 4 Geo. IV. c. 24. entitled “ An
“ act to make more effectual provision for permitting goods im-
“ ported to be received in warehouses or other places, without
“ payment of duty on the first entry thereof,” it is enacted,
“ That, from and after the commencement of this act, every
“ sale, fairly and bonâ fide made by the importer or importers,
“ proprietor or proprietors, of any goods or merchandize which
“ shall have been secured under the provisions of this act in
“ any warehouse in the actual occupation of such importer or
“ importers or proprietor or proprietors, such goods and mer-
“ chandize, and the possession thereof, shall, by such sale, be
“ transferred to and shall be vested in the purchaser or pur-
“ chasers thereof, to all intents and purposes whatever, although
“ such goods or merchandize shall continue in such warehouse;
“ and such goods or merchandize so sold, or the possession
“ thereof, or any title thereto, shall not pass to or be vested
“ in any assignee or assignees of such importer or importers or
“ proprietor or proprietors, under any commission of bankrupt
“ which may issue against such importer or importers or pro-
“ prietors, before such goods or merchandize shall have been
“ removed by the purchaser or purchasers, or their assigns,
“ out of or from such warehouse; and every such sale shall be
“ valid against such assignee or assignees under any such com-
“ mission of bankrupt, any law, custom, or usage to the contrary
“ notwithstanding; provided, that upon every such sale there
“ shall have been a written agreement, signed by the parties, or
“ a written contract of sale, made, executed, and delivered by
“ a broker or brokers, or other person or persons, legally autho-

April 4, 1831.

2D DIVISION.
ADMIRALTY.

April 4, 1831. “ rized, for and on behalf of the parties respectively, and the
 “ amount of the price stipulated in the said contract or agree-
 “ ment shall have been actually paid, or secured to be paid, by
 “ the purchaser or purchasers of such goods or merchandize, and
 “ that a transfer shall have been entered in a book to be kept
 “ for that purpose by his Majesty’s officers of revenue having
 “ the charge of such warehouse; which book the commissioners
 “ of his Majesty’s customs and excise, both or either, as the case
 “ may be, are hereby directed to cause to be kept by such
 “ officer, and produced on demand; and the said officer is hereby
 “ required to make such entry of transfer, specifying the date of
 “ such entry, upon the application of the owners of the said
 “ goods or merchandize: provided also, that no such assignment
 “ shall affect the bond given to his Majesty, on the warehousing
 “ of the goods or merchandize, for securing the payment of the
 “ duties thereon.” By the 9th section of the 6 Geo. IV. c. 112.
 which is entitled “ An act for the warehousing of goods,” and
 proceeds on a recital that it was desirable to consolidate the laws
 relative to the customs, it is enacted, “ That if any goods, lodged
 “ in any warehouse, shall be the property of the occupier of
 “ such warehouse. and shall be bonâ fide sold by him, and upon
 “ such sale there shall have been a written agreement, signed by
 “ the parties, or a written contract of sale, made, executed, and
 “ delivered by a broker or other person legally authorized, for or
 “ on behalf of the parties respectively, and the amount of the
 “ price stipulated in the said agreement or contract shall have
 “ been actually paid or secured to be paid by the purchaser,
 “ every such sale shall be valid, although such goods shall re-
 “ main in such warehouse; provided, that a transfer of such
 “ goods, according to such sale, shall have been entered in a book
 “ to be kept for that purpose by the officer of the customs having
 “ the charge of such warehouse, who is hereby required to keep
 “ such book, and to enter such transfers, with the dates thereof,
 “ upon application of the owners of the goods, and to produce
 “ such book upon demand made.”

In the month of July 1829 the respondents, Stevenson and Co., merchants in Leith, imported, by the Robert Brandt from Archangel, 1,229 quarters of oats. At this time they were the tenants of a bonded warehouse, situated in the Citadel of North Leith, in which they lodged the grain, in terms of the last

of these statutes—the officer of the customs having one set of keys, while they had another. On the 13th they sold the grain to John Rennie of Phantassy, at the price of £1,016, for which he granted his bill, payable four months after date. On the same day Rennie transmitted a note to Stevenson and Co., directing them to deliver the grain to Maxwell and Co., corn factors in Leith, and his ordinary agents. In consequence of this order Stevenson and Co. sent their set of the keys to Maxwell and Co., accompanied by the following letter: “Leith, 14th July 1829.—Messrs. Maxwell & Co., Leith.—Gentlemen,—Per bearer, we hand you the keys of Sanders’s lofts, No. 53–2 and 3, Citadel, North Leith, where the oats *ex* Robert Brandt are lying; and beneath you have a note of the different weighings by the porter at delivery. The quantity is 1,229 imperial quarters. We are, &c.

“THOS. STEVENSON & Co.”

Maxwell and Co. thereupon granted their acceptance for £2,000 to Rennie, on the credit of this consignment, and another of 500 quarters of wheat. This was acknowledged by Rennie in the following letter: “Maxwell & Co., Leith.—Edinburgh, 15th July 1829.—Dear Sirs,—I have this day received from you your acceptance for £2,000, at 3 months, as advance on 500 qrs. wheat, as per order on Anderson and Gavin; also to account of about 1,200 qrs. of oats delivered to you by Thos. Stevenson & Co. Yours truly,

“JOHN RENNIE.”

No written agreement passed between Stevenson and Co. and Rennie, and no transfer was made in the book of the officer of the customs.

Early in August Rennie became bankrupt, and Stevenson and Co., on the 15th, presented a petition to the Judge Admiral, setting forth the sale to Rennie and his bankruptcy, the order of delivery, the above clause of the 6 Geo. IV. c. 112, and praying for a warrant of service upon the officers of the customs, upon Rennie and Maxwell & Co.; and “to decern and ordain the said collector, comptroller, and officer, having the charge of the said warehouse, to deliver to the petitioners the said cargo of oats, upon their paying the duties legally chargeable thereon; and in the meantime to grant an interdict, prohibiting and discharging the said John Rennie

April 4, 1831.

April 4, 1891. “ and Maxwell & Co. from removing the said oats, or any part
“ thereof, from the said warehouse, and also prohibiting and
“ discharging the said officer, having the charge of the said
“ warehouse, from making any entry in the book kept by him,
“ importing that any sale or transfer of the said oats has taken
“ place, or from delivering the said oats, or any part thereof, to
“ the said John Rennie or Maxwell & Co., or to any other per-
“ son than the petitioners; and in the event of any opposition
“ being made to this petition by any of the parties above men-
“ tioned, to find the party making such opposition liable in the
“ expences hereof and of the procedure to follow hereupon.”

The officers of customs lodged answers, but the discussion on the merits took place with Maxwell & Co. alone. In defence, they maintained, 1st, that the delivery of the keys was not merely symbolical, but real and actual delivery of the grain; and, 2d, that the statute, 6 Geo. IV. c. 112. did not apply to this case, because it had reference to the case of a general bonded warehouse, where, from the variety of goods, the actual control and possession could not be given to the purchaser, but remained in that of the seller. Whereas, in the present case, the exclusive possession and control of the warehouse had been given to defenders, Maxwell and Co., except in so far as related to the duties. To this it was answered by Stevenson & Co.; 1st, that even at common law there had been no completed delivery, seeing that there was a joint custody, and consequently, the goods being still in transitu, they were entitled to prevent farther delivery being made; and, 2d, that the terms of the statute were quite explicit, the provision being express, that in order to form a complete sale there must be an entry made in the books of the officer.

The Judge Admiral pronounced this interlocutor: “ Finds,
“ that the oats in question, after being imported by the peti-
“ tioners, were lodged in a bonded warehouse, of which the
“ petitioners kept one set of keys and the officers of customs
“ another, and the petitioners entered the goods at the custom-
“ house, and granted bond for payment of the duties, after the
“ usual manner; finds, that the mode of transferring such goods
“ is provided for in the ninth section of the 6th of George the
“ Fourth, chapter 112; finds, that the transfer to Maxwell &
“ Co. was not made in terms of that provision of the statute,

April 4, 1831.

“and that the delivery of the petitioners' set of keys to Maxwell & Co. did not constitute a legal traditio: therefore appoints the said Maxwell & Co. to restore to the petitioners the keys of the warehouse, and prohibits and discharges them from interfering with the petitioners' right to said oats; but, in respect of the delivery which the petitioners made of the keys, finds them not entitled to expences; and with respect to the officers of the customs, in respect that the oats were entered by the petitioners, and bond granted by them for payment of the duties, finds, that said officers were not entitled to deliver the oats to any other person than the petitioners, unless a transfer had been made, in terms of the 9th section of the said statute; and as such transference did not take place, there was no occasion to call the officers of the customs as parties to this action; therefore assoilzies them, and finds them entitled to their expences.” He thereafter recalled it, in so far as it “appoints the keys to be delivered to Stevenson & Co., in respect that the original petition contains no prayer to this effect, but quoad ultra adhere,” and communicated his opinion in the subjoined note.*

Maxwell & Co. complained to the Court of Session by advocacy, but their Lordships † (2d March 1830) affirmed the judgments by repelling the reasons of advocacy, and remitting simpliciter, with expences. ‡

* “It appears to me that the clause of the statute in question is precisely applicable to the case which has occurred, and that the object of the Legislature was to introduce a special mode of transference of all goods which were bonded in a cellar occupied by the proprietor of the goods, whether the occupation was qua proprietor or qua tenant; and it appears plain, that the occupation alluded to is that which existed at the time of the sale. In all probability the view of the Legislature was to prevent collusive or fictitious sales which might take place, if a mere delivery of one set of keys of the warehouse were deemed sufficient, for this being a latent act, the keys might be delivered one day and re-delivered the next: whereas, in the case of bonded goods, there is a joint custody of the officers of the revenue, and of the custodier of the cellar; and it was proper, not only that the joint custodiers should be both parties to the sale, but the mode of transference prescribed rendered the transaction a public act. Had the clause not been so express, I would have been induced to order an inquiry into the practice of different ports; but the words being, as I interpret them, clear, I do not think that such an inquiry would be justifiable.”

‡ 8 Shaw and Dunlop, 618.

† Lord Cringletie observed, This appeared to me to be one of the plainest cases in the world. It is true, that in the case of a party having goods in his private warehouse,

April 4, 1831.

Maxwell & Co. appealed.

Appellants.—The Court below have applied the provisions of the statute to a case which does not fall within it. These pro-

if he sell the goods and deliver up the keys that is tradition of every thing. There is nobody there to intimate to. The act of parliament, however, does not apply to that case, but to bonded warehouses alone. If statutes provide a mode of carrying any transaction into effect, it is void if they be not strictly complied with. Now the cellar in the occupancy of Stevenson and Company is just within the very words of the statute; and when they sell, what have they to do but to observe the requisites of the statute? The sale is only good, if transferred in the books. But it is said that the keys were delivered up. Of what use were the keys, when the purchaser could not get in without the King's keys? They could not give him access, and were of no use but to authorize him to have the sale entered, and the goods transferred in the books. Even if the 6th Geo. IV. had never been passed, and the question were on the old law, I should say that this sale was not effectual; and I can have no sort of doubt that the interlocutor of the Judge Admiral is right.

Lord Glenlee.—I am of the same opinion. The 6th Geo. IV. makes a distinction between the case where the goods are the property of the occupier of the warehouse, or of another party; and I have no doubt on the meaning of the words. The words are not, if the whole goods are sold; but, if any goods in the warehouse are sold, the act takes effect. Stephenson and Company were occupiers, and I am at a loss to see how the act should not apply. An attempt was made in the inferior court to distinguish when there were other goods in the warehouse; but there is a new view taken now, which astonishes me—that delivery of the key makes the buyer the occupier of the cellar. How did he come to be proprietor of the goods? The transference must first be made out to him, and it is good for nothing, if the solemnities required by the act are not preserved.

Lord Pitmilley.—This question is attended with difficulty; and it is a new case, though, on considering it, I concur in the opinions delivered. The question depends entirely on the construction of the 9th section of the statute. There is a distinction made between goods belonging to the occupier of the warehouse, and goods belonging to a person not the occupier; and the act only applies to the former case. This is, because there cannot be intimation to the keeper of the warehouse; and the act provides a mode of transfer, by intimation to the King's officer. The statute does not say that the solemnities are not necessary where the keys are delivered; and I see no authority for saying that delivery of the keys, which is not mentioned in the statute, should be equivalent to entry in the books, which is required; and therefore, though this might have been a reasonable provision, yet, taking the words of the statute, I concur.

Lord Justice Clerk.—I must say, after paying all attention to the act, &c. that so far from considering this a question free from difficulty, I think it one of great difficulty and nicety indeed, and I doubt exceedingly how far the construction put upon the statute is applicable to the case here. I do not think the facts are sufficiently set forth in the record, particularly as to the character of cellars for bonded corn. If there were in the cellar other goods which could not be taken out without payment of the duties, the act of parliament unquestionably applies, as, in such a case, it would be merely an attempt to give symbolical delivery, by delivering, for half an hour, the keys which must be forthcoming to take out the other goods.

April 4, 1831.

visions were meant to protect purchasers from the hardship arising from the rule of the common law, in regard to the necessity of actual delivery, although every other precaution had been adopted to put the third parties on their guard. This had been strongly brought under public notice in the case of *Knowles v. Horsfall*. In that case certain casks of brandies, deposited partly in bonded vaults occupied by the seller, and partly in bonded warehouses kept by a third party, were sold, and marked with the initials of the purchaser, and the sale was notorious to those who were carrying on trade in the neighbourhood. The duties not being paid, they remained in their original position, and on the bankruptcy of the seller they were claimed by his assignees. The Court of King's Bench found themselves constrained to prefer the assignees, notwithstanding that the purchaser had *bonâ fide* paid the price, and the casks had been marked with his initials. To remedy this evil, it was suggested, that wherever goods were so situated that the purchaser could not receive exclusive possession of the warehouse by reason of other goods being placed there, it should be held sufficient delivery that a written agreement of sale had taken place, and an entry thereof to be made in a book to be kept by the officer of the customs. Accordingly the 4 Geo. IV. c. 24. provides, that in the case of the sale of goods situated "in any warehouse in the actual occupation of such importer or importers or proprietor or proprietors, such goods and merchandize, and the possession thereof, shall by such sale be transferred to and shall be vested in the purchaser or purchasers thereof, although such goods or merchandize shall continue in such warehouse;" and that the same shall be effectual against any assignee under a commission of bankrupt, provided that there was a written agreement of sale, the price paid or secured, and an entry made

The case alluded to seems to be that of a general bonded warehouse; and the statute provides a rule of transfer, without removal, to afford facility for the purposes of trade. The meaning is plain, and the reason was, that no intimation could be made to the keeper of the cellar, who is the vender himself. But the case here is different. We must, under this record, assume that there were no other goods in the cellar. Then, this person being occupier, is his case provided for? I think it is attended with very considerable doubt; and when it is averred that, in practice, entry in the books is never required, in any great port in the kingdom, in circumstances like the present, I confess that I doubt exceedingly the application of the statute.

April 4, 1831. in the books of the officers of the revenue. The same provision is in substance introduced into the 6 Geo. IV. c. 112. which was not intended to repeal, but to consolidate the previous existing statutes. In the present case the whole quantity of grain was transferred to the appellants, and the exclusive possession of the warehouse given to them by delivery of the keys, so that it did not remain in the occupation of the respondents, but in that of the appellants; and consequently the Court below acted erroneously in applying the statute to a case of this nature.

Respondents.—The words of the statute are plainly applicable to every sale of bonded property, where the goods are within any warehouse occupied by the seller. Numerous questions have arisen at common law as to what should be held constructive on actual delivery where goods were so situated; and in order to obviate these disputes (which were highly prejudicial to commerce) the legislature expressly enacted, that if goods, situated in the warehouse of the seller, should be sold, and actual delivery not made, they should only be held to be delivered provided a written transfer were executed, and an entry thereof made in the books of the officer. But in the present case the goods were situated in premises occupied by the respondents, for the rent of which they are responsible, were never delivered, no transfer made, and no entry in the revenue books. It never could be the intention of the legislature to establish a rule in such general terms, which was to have reference only to particular classes of cases, and which would necessarily be productive of litigation, in ascertaining the matter of fact whether the particular case fell within the class.

Lord Chancellor.—My Lords, I really consider the present question so perfectly free from doubt, that I do not trouble you to hear the counsel for the appellant in reply. Their Lordships in the Court below appear to have differed extremely upon it. One says, that it appears to him one of the plainest cases in the world; and then he goes on to state, as a general maxim of law, that “if statutes provide a mode of carrying any transaction into effect, it is void if they be not strictly complied with.” The rule of law is much nearer the reverse; for unless the statute is imperative, and provides, expressly or by plain implication, for the invalidity of an

April 4, 1891.

instrument if the requisites be not complied with, it is merely directory; and one of the propositions in law, the best known and most commonly cited, is, that a directory order in a statute needs not be complied with. Where it is merely directory, there is no forfeiture, no nullity, no invalidity by a breach of the direction; and in all such cases the question is, whether the order is directory or imperative, or, what is the same thing, treats a matter as a condition precedent. Now, the description the learned judge gives of what he deems imperative is descriptive of that which is directory. However, be that as it may, there are more serious objections to this decision. The next learned judge never seems to have applied his mind to the question, whether or not that principle touched the case. Lord Pitmilley considers it a difficult case, but, upon the whole, concurs in the opinion delivered, and says, it depends upon the construction of the 9th section of the statute. But this is clearly wrong—it does not depend upon that; it depends upon whether the 9th section of the act applies to this case. That is the question if there be a question. Then observes the Lord Justice Clerk, “I must say, after “paying all attention to the act, &c., that so far from considering “this a question free from difficulty, I think it is one of great “difficulty and nicety indeed; and I doubt exceedingly how far “the construction put upon the statute is applicable to the case “here.” But the rest of his opinion clearly shows that he never got a full and distinct view of the question before us, which is simply this, Whether there is any thing at common law, or any thing in this act, that renders the sale invalid, unless a compliance is had with the directions in the 9th section? Now, we in this country being familiar with the act, and with the case of *Knowles v. Horsfall*, and knowing how far that case and this 9th section of the act apply,—plainly see the mistake into which the Court below have fallen. Those judges who say it is a nice question are really almost as wrong as the others. There is no nicety in it; you might as well say there is doubt whether the eldest son is heir to his father. The fact is, that the old statute of James, and our bankrupt law, generally give to the creditors of a bankrupt, represented by the assignee, not only the goods in the possession of the bankrupt by a title of his own, but those which he may have sold, but of which he retains the possession and management. If he has the outward possession and management of certain goods, though he has sold them, and got the purchase money in his pocket, those goods pass to the assignee. That is the law of the land as to bankrupts. Then comes this hard case; and in all these cases the question is, Whether that is a possession within the meaning of the act—whether that, which is an apparent possession, satisfies the meaning of

April 4, 1831. the act of James? That question arose in the case of Knowles v. Horsfall. The party there had a lot of wines in his cellars. Knowles bought them by a sale-note of the seller. They were still in the bonded warehouse occupied by Horsfall; and though Knowles entered the cellar in that bonded warehouse with his leave and licence, and put a K upon them, and severed them from the rest of the stock, the question arose, Whether they were in the outward possession of the bankrupt, and came within the description in the statute of James? The Court held the affirmative reluctantly, though they had no doubt upon the law, but they held it reluctantly, and expressed their opinion that it was a hard case, because it was from the mere circumstance of their having been in a bonded warehouse that the question could arise; but they decided the question against the purchaser, and in favour of the assignees. Now, that was found to be a great hardship, and which could only have arisen in the case of a bonded warehouse occupied by the bankrupt; and it was conceived the party had done enough by marking the casks, to take them out of the possession of the bankrupt. And this section was inserted, “And be it further enacted, “that if any goods lodged in any warehouse shall be the property “of the occupier of the warehouse, and shall be *bonâ fide* sold by him.”—Can any mortal man imagine that the act should make such a provision for validating sales, and confine the validity to to one particular case, that may not happen once in ten times, of the goods being in a warehouse in the occupation of the seller of the goods? Why should not the same provision be made to render valid sales where the goods are not in the warehouse of the seller? But there is no such provision. Suppose goods in the king’s warehouse or under the king’s lock, not in the possession of the importer, that is *casus omissus* in the statute. I do not see why that should not be validated—the one is just as good as the other. But it is necessary that they should be *bonâ fide* sold. A sale means generally a *bonâ fide* sale, or it is no sale; but when you see those words in the act, it means such a sale, in such a form, and upon such good faith, as to exclude the claims of third parties,—“and “upon such sale there shall have been a written agreement signed “by the parties.” That is not necessary to make a sale of goods in your warehouse, or any other place, if they are not of 10*l.* value. The statute of frauds does not require it; but this statute requires it,—“or a written contract of sale, made, executed, and delivered by “a broker or other person legally authorized, for or on behalf of “the parties respectively, and the amount of the price stipulated “in the said agreement or contract shall have been actually paid “or secured to be paid by the purchaser.” That is exactly in order

April 4, 1831.

to show it must be a bonâ fide sale, regularly made by a written instrument from the seller to the purchaser, for a valuable consideration—not executory, but a regular sale executed, securing the price of the goods sold. This is quite immaterial to a common sale, but it is clearly material to a sale that is to have the effect of ousting the claims of a bankrupt's creditors; and to take it out of the operation of the statute of James, "every such sale shall be valid although such goods shall remain in such warehouse, provided that a transfer of such goods, according to such sale, shall have been entered in a book to be kept for that purpose by the officer of the customs having the charge of such warehouse, who is hereby required to keep such book, and to enter such transfers, with the dates thereof, upon the application of the owners of the goods, and to produce such book upon demand made." My Lords, I have therefore no doubt whatever. No man can doubt that this decision is erroneous. It proceeds upon an erroneous view of the subject, and raises up an invalidity the law knows nothing of, and then says, unless you bring yourself within the exception—a sort of negative pregnant arising out of a very full affirmative—the transaction is invalid. But unless you can assume that to be the law which is perfect nonsense, I do not see how it is possible to maintain this decision. With respect to the payment of duties by Messrs. Stevenson, I suppose, upon the sale to Mr. Rennie, they deducted them, recouping themselves by a part of the price from Mr. Rennie; and I suppose Mr. Rennie recouped himself by his undersale to Messrs. Maxwell; but I am stopped upon that—that must be dealt with in another way. Then we have Messrs. Stevenson delivering the key to Messrs. Maxwell and Company, admitting them to be the purchasers under Mr. Rennie. As to the letters, they may be genuine letters—they may be letters written by Mr. Rennie to Messrs. Maxwell—but they are no evidence as against Messrs. Stevenson. The proof of the matters contained in them ought to be by calling the parties who wrote them, and subjecting them to cross-examination. But what gets rid of all the difficulty that has occurred by the sale by Rennie to Maxwell and Company is this, that Maxwell and Company could have no right to the delivery of the goods from Stevenson, except by virtue of that sale to Rennie. They had sold to Rennie, and they deliver not to Rennie, but Maxwell & Co.; that is an adoption by them of Rennie's contract. If I deliver the key of a warehouse, it is a symbolical delivery of the warehouse, but an actual delivery of the goods in the warehouse; whether it is a delivery of all the goods I have there, there is some little doubt about; but if I deliver the keys, with a delivery-note,

April 4, 1831. directing the stakeholder, the warehouseman, or the King's lock-keeper, to give the goods up, that is a delivery of the goods to the party; and all question as to *transitus* or stoppage in transitu is at an end. For these reasons I feel no hesitation in recommending your Lordships to reverse the interlocutors complained of.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellants' Authorities.—1 Bell, 175; Auld, June 12, 1811; (F. C.) Knowles, 5 Bara & Ald. 134; 1 Bell, 195.

RICHARDSON and CONNELL—M^cRAE,—Solicitors.

No. 23. FRANCIS GRAHAM, Appellant.—*T. H. Miller—Rutherford.*

STEWART JOLLY, Respondent.—*Lord Advocate (Jeffrey)—Lushington.*

Entail—Homologation—Landlord and Tenant.—Held (affirming the judgment of the Court of Session), that an heir of entail had by acts of homologation rendered himself liable for meliorations under an obligation granted in a tack by a preceding heir.—But, 2, (reversing the judgment), that under a clause in a lease providing that the tenant should have right to the difference of value between the houses on the farm at the date of the tack, and of those on the farm at the termination of it, the tenant was entitled to the value in so far as the houses on the farm at the date of the tack were improved, or others suitable to the farm built in lieu of the same, and better than the same at the expiration of the tack; but not of houses built new except as above.

June 29, 1831.

2^D DIVISION.
Lord Cringletie.

CAPTAIN FRANCIS GRAHAM executed an entail of the estate of Morphie, which contained the following prohibition, fortified by irritant and resolute clauses:—"That it shall be noways
" lawful to the said William Barclay, and his foresaids, nor to
" the other heirs of tailzie herein substituted to him, to alter, in-
" fringe, or break the said tailzie, order, or course of succession,
" nor to sell, dispoise, redeemable or irredeemable, the said
" lands of Morphie-Meikle, and lands of Pilmour, nor any part

“ thereof, nor to burden the same with infestments of annual rent, June 29, 1831.
 “ nor any yearly duties, more or less, to be uplifted furth of the
 “ same, nor to contract debts, nor to give bonds, bills, or obli-
 “ gations therefor, nor to do any other fact or deed whatsoever,
 “ civil or criminal, or even treason, (which God forbid), whereby
 “ the said lands of Morphie-Meikle, and lands of Pilmour, or
 “ any part thereof, may be evicted from them, or become cadu-
 “ ciarie, escheated, or confiscated, or the order and course of
 “ tailzie and succession above specified, any way divested, frus-
 “ trated, or interrupted.” In virtue of this entail William
 Graham succeeded to the estate. At this time the lands of
 Morphie-Meikle, and of Pilmour, forming part of the estate,
 was in possession of Jean Smith, with the exception of a small
 part held by James Abercrombie. In 1762 Graham let these
 lands (with the exception of the part possessed by Abercrombie)
 to William Gibson, his heirs and assignees, for the period of fifty-
 seven years, at a rent payable partly in grain and partly in
 money, amounting in all to 200*l.* per annum, besides a grassum
 of 100*l.* instantly paid. This lease Graham bound himself, “ his
 “ heirs, executors, and successors whatsoever, to warrant to be
 “ good and sufficient to the said William Gibson and his fore-
 “ saids, at all hands mortal.” Among other stipulations it con-
 tained the following, which gave rise to the present discussion :—
 “ And in order to encourage the said William Gibson, and his
 “ foresaids, to make parks and enclosures upon the said farm,
 “ and to plant hedges and trees along the dykes, ditches, or
 “ fences thereof, the said William Grahame hereby binds and
 “ obliges himself, and his foresaids, to furnish to the said William
 “ Gibson, and his foresaids, gratis, whatever plants of hawthorn,
 “ any young trees they shall call for, from time to time, for
 “ planting hedges, for enclosing these parks or enclosures, and
 “ also for planting trees along these hedges, or other dykes,
 “ ditches, or fences enclosing the same ; and also, at the issue or
 “ expiration of this tack, to pay, or allow to the said William
 “ Gibson, and his foresaids, the value of all those dykes, ditches,
 “ hedges, and other fences and trees to be so planted, according
 “ as the same shall be then valued and appraised, by two neutral
 “ skilful men, mutually to be chosen, both by the heritor and
 “ tenant, seeing the heritor will then have the benefit of all those
 “ fences and trees. Furthermore, it is hereby provided and

June 29, 1831. “ declared, that the whole houses and biggins on the said farm,
“ except the dwelling-house after-mentioned, are to be estimated
“ and appraised over to the said William Gibson, at his entry
“ thereto, by two neutral men, mutually to be chosen by both
“ parties; and as the dwelling-house presently possessed by the
“ said Jean Smith is in a ruinous condition, therefore the said
“ William Gibson hereby binds and obliges him, and his fore-
“ saids, at his entry to the said land, to build a new dwelling-
“ house on the ground where it stands, not less than thirty-six
“ feet in length, and fifteen feet in breadth, within the walls;
“ and the said William Grahame binds and obliges him, and his
“ foresaids, to furnish whatever timber shall be necessary thereto,
“ for making it a good and sufficient farm-house, with a loft
“ therein, and also to pay to him 120*l*. Scots, for helping to de-
“ fray the charges of the work, and that at the first term of
“ Whitsunday or Martinmas, after the said William Gibson shall
“ finish the said dwelling-house; and the said William Gibson
“ binds and obliges him, and his foresaids, to transport the
“ said timber from Montrose, or any place of the like distance,
“ and to furnish all the other materials, workmanship, and
“ charges, for completing the said dwelling-house; after which,
“ that house is also to be valued and appraised, by two neutral
“ men, to be mutually chosen, as aforesaid: And the said Wil-
“ liam Gibson and his foresaids are to uphold these houses and
“ biggins during the whole space of this tack; and at the expi-
“ ration thereof, they are again to be valued and appraised by
“ two neutral men, to be mutually chosen, by both parties; and
“ if at the said last appreciation, the appraised value of these
“ houses and biggins, including the dwelling-house so to be built,
“ shall exceed the values thereof at the first appreciation, then
“ the said William Grahame, and his foresaids, shall be bound
“ to pay, or allow the meliorations to the said William Gibson,
“ or his foresaids. And on the contrary, if at the last appre-
“ ciation the appraised values shall be less than at the first, the
“ said William Gibson, and his foresaids, shall be bound to pay
“ the deterioration, or deficiency, to the said William Grahame,
“ or his foresaids.” No valuation was at this time made, and on
the death of Grahame in 1776, he was succeeded by his son
Robert. This person in 1785 granted a lease to Gibson of the
part which had been possessed by Abercrombie, and had been

excepted from the former lease. It was to endure for the remaining period of the original lease, contained a similar clause as to the valuing of the houses, and the rent was to be such "reasonable sum" as should be fixed by mutual referees. In 1792, Robert Grahame and Gibson subscribed an inventory and valuation, by which they declared that the true appraised value of the houses, as at the time of Gibson's entry, was 36*l.* 9*s.* 6*d.*, and that this should form "a rule for settling betwixt the heritor and tenant regarding the houses on the farm at expiry of the tack, agreeably to the stipulations therein contained." On the death of Robert in 1793, and of his son who died in apparen-
 June 29, 1831.
 cy in 1794, the present appellant (who was son of the granter of the lease and brother of Robert,) succeeded to the estate. He did not challenge the lease, but took part of the rent, and on the 18th of July 1799, indorsed the following declaration on the second lease:—"I, Francis Graham, do hereby declare, that the yearly rent payable by the within designed William Gibson, for the possession within mentioned, was fixed at seventeen pounds sterling, and the same has accordingly been paid since his entry to the house; and that the houses thereon were valued and appraised to fifteen pounds sterling, at the period stipulated for that purpose by the tack." In the course of the same year, Gibson, in consideration of 1,000*l.*, and of a surplus rent of 90*l.*, assigned the lease to Stewart Jolly, who in consequence entered to possession. He continued undisturbed, and paid the rent regularly to Francis Graham, who received it without objection till the last year of the lease. The rent of that year Jolly declined to pay, on the ground that it was greatly more than extinguished by the claim which he had against Graham for the value of houses on the farm, which he had either repaired, built of new, or erected. In consequence of this Graham applied to the Sheriff of Kincardineshire for a warrant of sequestration, which was opposed by Jolly on the above ground, and he lodged a bond of caution in common form. At the same time he raised an action against Graham, concluding for payment of 1,250*l.* 8*s.* 11½*d.*, as the sum due to him. The sheriff having repelled the claim of retention, and allowed the bond to be enforced, Jolly complained to the Court of Session by advocacy, and also brought up his own action by an advocacy ob contingéntiam. These processes were after-

June 29, 1831. wards (5th Dec. 1820, and 17th Nov. 1821) conjoined, and the leading points which arose were: 1. Whether Graham was liable for the claim made by Jolly; and 2. Supposing that he was so, whether he was liable to the full extent demanded?

With reference to the first of these points, Jolly contended that there was no effectual prohibition in the entail sufficient to protect an heir from liability for a claim of this nature. But he mainly rested on an allegation that Graham represented the granter of the lease, and that he had by his acts and deeds homologated and adopted the lease.

In regard to the representation, the facts stood thus: in 1748 an entail was made, under a contract of marriage between Graham's father and mother, of the estate of Ballindarg, but which was not recorded till 1792, whereas the obligations in the lease had been contracted in 1762. In virtue of this entail Graham succeeded to Ballindarg. Under the same deed a provision was made in favour of the younger children, which was to be payable at their father's death, or at their respective marriages if these should happen previous to that event. Graham did not marry before his father's death; and being then in the position of one of the younger children, he received 900*l*.

The main circumstances relied on in support of the plea of homologation were that Graham received payment, without objection, of the rents stipulated in the lease, from the period of his succession till its termination. That he had indorsed the above certificate fixing the rent, payable under the second lease, which bore express reference to the first; and that a submission had been entered into between him and the respondent as to the cropping.

On advising the cause, the Lord Ordinary issued the subjoined note of his opinion* :—

* “ The Lord Ordinary has advised this cause, and will advert to the pleas urged by the defender in their order.

“ The first which naturally presents itself is, whether this action be competent at all against him, until the heirs of line of William and Robert Graham shall be discussed. On this, the Lord Ordinary is of opinion, that the action at Mr. Jolly's instance against the defender is competent, in respect that he succeeded to the subject out of which the claim arises.—See Erskine, b. 3, tit. 8. sec. 52.

“ The next question is, whether the defender is liable or not for this claim, in respect that he is an heir of entail only, who does not represent the granter of the lease out of which the action has arisen. And here the Lord Ordinary thinks that

Thereafter, on the 22d of May 1822, his Lordship pronounced this interlocutor:—“ Finds, that Francis Graham, June 29, 1831.

“ there is a distinction between the first and second tacks. For, with regard to the
 “ second, the rent was not filled up in it, but was left blank; and although the lease
 “ contained a stipulation relative to the value of the houses, and a stipulation that
 “ meliorations should be allowed on these houses to the tenant at the end of the
 “ lease, yet the value of the houses at the commencement was not specified in it.
 “ Both of these defects were corrected by the defender himself. He wrote on
 “ the lease itself a declaration, that the rent was 17*l.*, and the value of the houses
 “ was 15*l.*, which was clearly making himself a party to that lease, and giving the
 “ tenant reason to believe that the defender would implement the obligation as to
 “ the houses.

“ With regard to the houses, and fences and trees on the lands contained in the
 “ other lease, the pursuer does not say that any additions were made to the houses or
 “ fences, nor that trees were planted by him; so that no plea can arise from the
 “ defender’s acquiescence in such acts. With respect to homologation, if the plea of
 “ the pursuer rested solely on the ground that the defender had accepted payment of
 “ rent from the pursuer, the Lord Ordinary would not have thought, that by the
 “ mere acceptance of rent he would have subjected himself to obligations not other-
 “ wise incumbent on him; but on the subject of homologation, there is something
 “ said in additional articles to the pursuer, Mr. Jolly’s condescendence, about a
 “ submission entered into by the pursuer and defender, relative to the farm, the
 “ nature of which is not explained, nor the submission itself produced; and the Lord
 “ Ordinary inclines to think that the defender did not see these additional articles;
 “ and therefore, this matter requires additional explanation.

“ Independent, however, of this, it is stated, and not denied, that the defender’s
 “ father inherited the estate of Ballindarg in virtue of a deed of entail, which was
 “ not recorded at the time he entered into the lease, nor till 17th November 1792;
 “ and as the obligations contained in the lease were effectual against that estate, to
 “ the effect of their being implemented to the tenant, Mr. Gibson, the Lord Ordinary
 “ cannot see that, in consistency with the judgment in the case of Smollet’s creditors,
 “ 14th May 1807, the defender is entitled to plead, that, holding that estate of
 “ Ballindarg, he is not liable to implement the obligations of the lease in question.

“ To the extent, too, of 900*l.* of provision received from his father, the defender
 “ appears to be liable as an heir of provision to him; for although it be true that the
 “ defender might have been a creditor of his father, provided he had married during
 “ his father’s life, yet he did not marry, and the provision descended to him at his
 “ father’s death. He was, therefore, a conditional creditor only; and the condition
 “ not having been purified, he became an heir of provision in a question with onerous
 “ creditors of his father.

“ On the general point of law, that an heir of entail is not entitled to grant leases,
 “ in which he imposes obligations on the subsequent heirs of entail, for sums of
 “ money to be paid to the tenant at the end of his lease, for improvements during its
 “ subsistence, the Lord Ordinary has no sort of doubt. If the entail be regular, and
 “ prohibit the contraction of debt, under the usual irritant and resolute clauses,
 “ such obligations cannot be effectual against the subsequent heirs; and in addition
 “ to this, to sustain such an obligation, would be to cut off their claims against heirs
 “ succeeding to them, for a proportion of the cost of these improvements, competent

June 29, 1831.

“ Esq., although an heir of entail, is liable to implement to
 “ Mr. Jolly the whole clauses and conditions in the two leases
 “ originally granted by the deceased William and Robert Gra-
 “ hame to William Gibson, and assigned to Mr. Jolly, both as
 “ having homologated both these leases, and as representing his
 “ father, the said William Graham, in the manner explained by
 “ a note prefixed by the Lord Ordinary to his interlocutor,
 “ dated 15th January last; but before determining to what ex-
 “ tent the said Francis Graham is liable for meliorations, in
 “ terms of said leases, to the said Stewart Jolly, as the reported
 “ value of the houses appears to be quite extraordinary, when
 “ compared with the value of the houses as declared by William
 “ Grahame and William Gibson, and by Francis Graham, Esq.
 “ and said William Gibson; appoints the complainer, Mr. Jolly,
 “ to condescend whether the houses so valued in June 1820 be
 “ the same houses which existed on the farm when the said leases
 “ were granted, and were afterwards valued by the said William
 “ and Francis Graham, or whether there are additional houses,
 “ and if so, to specify them, when they were erected, and their
 “ value; and if there be not additional houses, to specify the
 “ improvements that have been made to enhance their value to
 “ such a degree.” Against this judgment Graham lodged a repre-
 sentation, which was superseded till the points of fact should be
 cleared up by the condescendence. On resuming consideration,
 the Lord Ordinary, “ in respect of the judgment of the House of
 “ Lords in the case of Vans Agnew,” reported the cause to the
 Inner House on informations, and on the 24th of February 1824,
 the Court pronounced this interlocutor:—“ In respect of his
 “ own approbatory acts, find the said Francis Graham liable to

“ by 10th Geo. III. cap. 51; because, in order to recover that proportion, notice
 “ must be given to the succeeding heirs before the improvements are begun, and they
 “ must all be recorded in the Sheriff-court books, none of which solemnities were
 “ observed in this case, nor are generally when tenants are left to make improve-
 “ ments. But here, if the defender be liable, as having homologated the leases, and
 “ also as representing the granters of them, it excludes entirely the general case of
 “ the liability of an heir of entail, who does not represent the granter.

“ As, however, it is proper that the whole facts of a case should be expiscated
 “ before the cause leaves the Outer House, the Lord Ordinary will not divide the
 “ cause by pronouncing any interlocutor on the merits, till the point of homologation
 “ be entirely cleared up. The quantum of meliorations will afterwards be taken by
 “ themselves.”

“ the said Stewart Jolly in implement of the whole clauses and conditions in the two leases originally granted by the deceased William and Robert Graham to William Gibson, and as signed to the said Stewart Jollie: Find, separatim, that the said Francis Graham, in respect of his having succeeded to the estate of Ballindarg, and that the entail thereof was not recorded till after the dates of the said tacks, is liable to implement the said obligations, suo ordine; and in order to ascertain the quantum of meliorations for which the said Francis Graham is liable, remit to the Lord Ordinary to hear counsel for the parties thereon, and to do therein as his Lordship shall see cause.”* In consequence of this interlocutor, the Lord Ordinary (15th June) remitted “ to the Sheriff-depute or substitute for Kincardineshire, to name proper persons to inspect the houses on the farm in question, and to report what houses were on the farm when the tack commenced, what houses are still thereon, whether these are fit and suitable to the farm, in what order they were left, and to report a valuation of each house separately.” A report was thereupon made, and the Lord Ordinary having again reported the cause to the Court on cases, their Lordships†, on the 12th of December 1827,

* 2 Shaw and Dunlop, 730.

† *Lord Justice Clerk* observed, I could have wished to have had the case more prepared for final judgment than it is. We must take for granted, that all the objections on the entail are at an end, and that Mr. Graham is bound to fulfil all the obligations of the lease as if he were a fee-simple proprietor; but all that I feel warranted to state at present is my opinion as to the principle of the construction of the lease. Admitting that there were no more buildings than were necessary, I am not prepared to say that Mr. Jollie is entitled to decree for all the sum claimed. The question is, what is the fair extent of the landlord's obligation? I think it is this, that to the extent of the buildings existing on the farm at the time the lease commenced, and which, by the decaying nature of such buildings, it became absolutely necessary to rebuild, in so far as they were rebuilt of nearly the same dimensions, or even with some reasonable improvements, the tenant would be entitled to reimbursement. But when we see the tenant proceeded to build large and commodious buildings, though no doubt a great advantage to the landlord, yet I cannot think that under the clause he was entitled to repayment, as if it had been provided that he was to have reimbursement for any new buildings, &c. which might be useful, while the clause in the lease relates only to the buildings then on the farm. Now, from the great change in the mode of cultivation during the long period of this lease, many new buildings became necessary and proper, but then they were not the buildings in the contemplation of the parties in the lease. As to the case of Ducat, I admit it is a pretty strong case; but even there it was only a new house in place of the one formerly existing for which

June 29, 1831. found, that “the advocator, Stewart Jollie, is entitled to meliorations for houses and biggins, whether repaired or built of new, in so far as the same are necessary and suitable for the farm, and remitted to the Lord Ordinary to proceed accordingly, reserving entire all question of expences.”* His Lordship, on the 14th of June 1828, pronounced this judgment:—“Finds,

remuneration was demanded, while here are buildings having no parallel in the old steading at all, and indeed a number of buildings which I cannot suppose necessary on the farm at all. And I cannot stretch the clause to buildings having no parallel in the former steading, and therefore I would only allow remuneration for the renewal of old buildings which had become ruinous.

Lord Pitmilley.—I agree that it would have been better had the case been more prepared, as at present we can only lay down principles, and send it back to the Lord Ordinary. But we must endeavour to lay down principles of decision; and I certainly think the landlord’s construction of the clause a great deal too strict. He says it only applies to the identical houses existing on the farm when the lease was granted. I cannot put this construction on it; the whole clause proceeds on the supposition that the houses are to be repaired, and if rebuilding necessary, I think the clause extends to it; and a special provision as to dwelling-house was inserted, because the old house was in a ruinous condition at the date of the lease. And seeing that the old buildings were such that it was impossible to repair them, being made of mud, it is clear the additional value of new buildings must be paid for. I would by no means stretch it to this, that if the necessity of rebuilding arose from the neglect of the tenant, he should be entitled to reimbursement; but that is not the case here, as the houses from their construction necessarily became ruinous. As to the extent to which the tenant is entitled to remuneration, I am disposed to go further than your Lordship. I have always understood that the case of Ducat was well decided; and I think it lays down this principle, that when buildings are necessary and suitable, the tenant is entitled to repayment under a clause such as that in Ducat’s case, which I cannot distinguish from this. I cannot say how far this principle will go as to the particular buildings here, but the case must go back to the Lord Ordinary to apply these principles, following the case of Ducat as nearly as possible.

Lord Alloway.—I concur entirely with Lord Pitmilley. The case is not ripe for decision, except to determine the general principle. I cannot go the length of saying that the whole articles for which remuneration is claimed are to be allowed; but according to the principles of the case of Ducat, I think the tenant entitled to repayment for all buildings necessary and proper for the farm; and I consider the case of Ducat much stronger, both as to the words of the lease, and because the tenant was put upon his guard by the landlord protesting that he was not to be liable. The appointing of an appraisement to be made at the end of the lease proves that the tenant was to be indemnified for houses to be erected; and he was entitled to make the new buildings correspond with the improved state of the farm. Thus if the farm only maintained 12 cows at his entry, and the byre only held that number, but if it now raises 200, was he to build the new byre only to hold 12? I would have been of the same opinion if there had been no case in point; but the case of Ducat, where a bill was actually refused at once, sets the matter at rest.

* 6 Shaw and Dunlop, 236.

“ that the valutors and inspectors, named by the Sheriff, in obe- June 29, 1831.
“ dience to an order by the Lord Ordinary, differ in their opi-
“ nions with respect to the buildings on the farm of Morphie
“ being necessary and suitable for the farm, insomuch as that two
“ of them swear that the court or straw-yard is too small, and
“ cannot be extended, and the accommodation in general cannot
“ be made such as it ought to be, unless nearly the whole of the
“ buildings were pulled down, and rebuilt according to a judi-
“ cious plan : but finds, that other five of the said valutors are
“ of opinion that the said houses, so far as they exist, are fit and
“ suitable to the farm, with the exception of the dwelling-house,
“ barn, and two byres, which they consider to be unsuitable, so
“ far as they are placed in an inconvenient situation : Finds, that
“ the valuations made under the authority of the Sheriff, in June
“ 1820, are those which must be adopted, as they were made
“ after the expiry of the lease, which was the period stipulated
“ for their valuation, and that the amount due to Mr. Jolly is
“ 1,250*l.* 8*s.* 11½*d.*, for both houses and fences, after deducting
“ the original valuation of the houses, made by the landlord and
“ his tenant, Gibson, some years after the date of the lease to the
“ latter : Finds, that Mr. Graham presented two petitions to the
“ Sheriff for sequestration of Mr. Jolly’s stock and crop on the
“ said farms, in security and for payment of the victual-rents due
“ therefor, for crops 1819 and 1820, so that any rents that were
“ stipulated by the tacks to be paid in money, were tacitly ac-
“ knowledged to have been paid, since the sequestration was not
“ asked for payment of these rents in money ; neither is there in
“ the said petitions any allegation that said money-rents had not
“ been paid : Finds, therefore, that the said victual-rents for said
“ two crops amount to 343*l.* 1*s.*, which being deducted from the
“ foresaid larger sum of 1,250*l.* 8*s.* 11*d.*, leaves due to Mr. Jolly
“ the sum of 907*l.* 7*s.* 11*d.*, for which decerns in favour of the
“ said Stewart Jolly ; and as to the expences of process, finds the
“ said Francis Graham liable for the expences of the question,
“ whether he, as heir of entail, was bound to the said Stewart
“ Jolly for the meliorations of the houses and fences ; finds both
“ parties equally liable, i. e. each for half of the proof and reports
“ for ascertaining the extent of said meliorations ; and further,
“ finds said Francis Graham liable for the expences of resisting
“ the sequestrations in the inferior court, and advocating these

June 29, 1831. “two processes to this Court; but to no other expences, after
“these advocations were brought into this Court, except as above
“specified.”

Both parties reclaimed; Graham on the merits, and Jolly as to the expences and interest, in support of the latter of which he brought a supplementary action, which was conjoined. The Court, on the 2d of July 1829, adhered to the interlocutor, except as to interest, which they found due to Jolly from the date of the expiry of the lease in 1820.*

Graham appealed.

Appellant.—1. The appellant is not liable for the claim which has been made against him. The lease was not granted by the maker of the entail, but by an heir succeeding in virtue of the entail. Under that deed he had no power to grant the lease, which, both in respect of grassum and endurance, might have been reduced. Still less had he power to impose on succeeding heirs an obligation of the nature of that contained in the lease. It has been repeatedly found that claims for meliorations, arising at the end of a lease, must be made, not against the heir of entail, but against the general representatives of the granter of the obligation. Neither does any liability exist against the appellant in respect of representing the granter. It is true that he has succeeded to the estate of Ballindarg, and that the entail was not recorded till posterior to the lease; but this is of no relevancy in the present question. That entail was an onerous deed; and although the circumstance of non-recording might give rise to a question as to the effect of obligations contracted in reference to that estate, it is of no importance in the present discussion. Although it accidentally happens that the appellant is heir of entail to both estates, yet the case must be judged of as if the heirs were separate; and in that case it could not be pretended that he, as heir of entail of the estate of Morphie, was liable to implement this obligation. Neither is there any relevancy in the allegation as to the money provision, because as that was in one event

* 7 Shaw and Dunlop, 824.

payable during his father's lifetime, the appellant was a proper creditor, and not a mere heir of provision. June 29, 1837.

The allegations in support of the plea of homologation are equally irrelevant. It is true that the appellant did not challenge the lease, and that he received payment of the rents; but it has been repeatedly found that taking payment under a reducible deed does not infer homologation. The certificate indorsed on the second lease was made with no view of homologating or approbating either it or the prior lease, but simply as declaratory of the fact (which did not otherwise appear) that the referees had fixed the rent at the sum there specified.

2. The interlocutors are erroneous, in respect that they do not give effect to the precise terms of the clause, but extend it beyond the contract of parties. The claim of the respondent, which has been sustained, is for 1,200*l.*, while the original valuation of the houses, &c. was only 36*l.* 9*s.* 6*d.* The reason which has been assigned for giving effect to this very large claim is, that the houses which were built were suitable to the farm. The clause, however, merely provides that the tenant should receive the appraised value of the original houses and biggings (including the dwelling-house to be built) on the farm, in so far as that value should exceed that of the first appreciation. It never could be the intention of parties that the tenant was to be entitled to build houses in a style and on a scale different altogether from the former houses, or at least that the landlord should be bound to pay for them, merely because judges in a court of law might think that the houses so built were suitable, under new and emerging circumstances, to the farm.

Respondent.—1. The entail of Morphie contains no prohibition sufficient to protect the appellant from the present claim. Independent of this, however, he is clearly bound, both by representing the granter of the lease and by his own acts of homologation. He admits that he has succeeded to the estate of Ballindarg, under an entail which was not recorded at the date of the obligation. Whatever effect that entail might have in a question inter hæredes, it could not protect the estate from being attached by the creditors of the appellant's father. But the respondent, as in right of Gibson, was a creditor, and the recording of the entail cannot place him in a different position.

June 29, 1831. The appellant, therefore, having taken up the estate of Ballindarg, is liable to the respondent; for it is plain that the respondent might proceed by diligence to enforce payment of his debt out of that estate. He is also liable to the extent of 900*l.*, which he obtained as heir of provision from his father. That sum was granted clearly mortis causâ; and it is thus impossible for the appellant to pretend that he was a creditor.

But even admitting that otherwise the appellant would not have been bound by the leases, his acts of homologation are of themselves sufficient to render him liable. The lease was a good and effectual lease, and accordingly was never challenged. But supposing that it was not so, the appellant recognized its validity, and barred himself from objecting to it, by taking advantage of the provisions contained in it, exacting payment of the rent for upwards of twenty-five years, and testifying that it was good and effectual by the certificate which he indorsed on the second lease.

2. According to a fair construction of the obligation, the respondent is entitled to the full sum which has been awarded to him. A proof was taken in the Court below, in regard to the value of the meliorations, and the parties there declared that they had no further evidence to adduce. The fact, therefore, that the meliorations were of the value decerned for is undoubted; and the only question is, whether there is any part of it for which the appellant is not liable. In the case of Ducat against the Countess of Aboyne, it was found, with reference to an obligation similar to the present, that a new house, if not inadequate to the size of the farm, though larger than the old one, which had become ruinous, was a melioration for which the tenant was entitled to be paid at the end of the lease. Although, therefore, the houses which had been built are more valuable than those which were originally on the farm, yet it cannot be pretended that they are unsuitable, as the farm is now let at about 800*l.* a year. The judgments are well founded.

Lord Chancellor.—My Lords, it being admitted on all hands that that which has passed between succeeding heirs of entail may make a man who holds an entailed estate liable for the conduct of those preceding him, so far as the estate is improved by the execution of the contracts which have been entered into, the first question is,

whether there is any thing in this case to withdraw the party against whom the claim for meliorations is brought, out of the reach of the rule, by his having taken up, or those whom he represents having taken up, a qualified service, or in respect of acts homologating or confirming? Because it is admitted, that on one or other of these grounds a party may be liable, the heir of entail having become as it were privy to the contracts made in respect of that estate by those preceding him. Now, it is unnecessary for me to argue this at any length, as my opinion goes with the decision of the Court below. I shall recommend, therefore, to your Lordships to adopt the ground on which it has decided the bulk of this case. That would leave untouched the interlocutors of the 5th of December 1820, the 17th of November 1821, the 22d of May and the 14th of June 1822, of the Lord Ordinary; and this might seem to imply that there is an alteration necessary in the interlocutor of the 15th of June 1824 of the Lord Ordinary; because there for the first time he introduces, as far as I can perceive, the doctrine of additional houses built upon the farm coming within the scope of the meliorations to which the tenant is entitled, and an inquiry is directed whether those are fit and suitable to the farm or not. But as the inquiry might have gone on very well with respect to that which I humbly think is a fit subject for inquiry with that which appears not to be fit, it will be unnecessary to alter that interlocutor of 15th June 1822, because it was mere surplusage. The interlocutor of the 24th of February 1824 must stand, there being in it no departure from the general view I have taken of the case; but those of the 12th of December 1827 and the 2d of July 1829, I should suggest to your Lordships the propriety of varying, and, on that variation, of remitting.

June 29, 1831.

My Lords, the second question is, to what extent he is liable; that is, what the tacksman, or the representative of the tacksman, is entitled to at the termination of the tack? Now, in my opinion, the Court below have not soundly decided the respective rights of the parties. The tack is and must be the governing instrument, settling the mutual rights of the parties; and it is fit to be observed, that a court of law or equity never more widely departs from that which usefully and safely is its office, than when it puts itself in the place of conflicting parties, or of a testator; for the observation applies equally to cases where the Court in effect permits itself to make a new will or a new bargain, instead of construing the will or the bargain. I cannot help thinking that their Lordships applied their attention too much to whether it was fitting that the party in the case should be made liable or not, and did not sufficiently

June 29, 1831.

attend to that which we should call here matter of further directions; that they set themselves in the situation of contracting parties, conceiving they might deal with and mould the contract; and that they appear rather to have made a new contract for the parties than to have construed the two contracts made in the years 1762 and 1785 respectively. The Court of Session appear to have taken these contracts as general contracts for meliorations, and that, consequently, if entitled at all, the tenant was entitled to every thing which could be called a melioration; that new buildings might be erected,—not only new buildings in the place of old, but if it pleased the tenant to erect what he considered improvements to the farm, which the landlord might not consider as such, yet he was to pay for them exactly as if he had contracted to do so at the expiration of the lease. But your Lordships will find that is by no means the contract between the parties. It is in these terms: “Furthermore, it is hereby provided and declared, that the whole “houses and biggings,” which I take for granted means the out-houses, as contra-distinguished from the dwelling-house,—the barns, and out-houses,—“on the said farm, except the dwelling-house after “mentioned,” and that is excepted, because it is dealt with in the next succeeding clause, “are to be estimated and appraised over “to the said William Gibson, at his entry thereto, by two neutral “men, mutually to be chosen by both parties; and as the dwelling- “house presently possessed by the said Jean Smith is in a ruinous “condition, therefore the said William Gibson hereby binds and “obliges him and his foresaids, at his entry to the said lands, to “build a new dwelling-house on the ground where it stands, not “less than thirty-six feet in length and fifteen feet in breadth within “the walls;” the very size of it is limited, and something like a price is fixed, for the landlord is to pay £120 in part of that; “and “that at the first term of Whitsunday or Martinmas after the said “William Gibson shall finish the said dwelling-house; and the “said William Gibson binds and obliges him and his foresaid to “transport the said timber from Montrose, or any place of the “like distance, and to furnish all the other materials of workman- “ship, and charges for completing the said dwelling-house, after “which that house is also to be valued and appraised by two neutral “men, to be mutually chosen as aforesaid.” This, therefore, provides for that which had been previously excepted; and thus it stands, that all the buildings, not only the buildings already on the farm, but even the new one about to be erected, should be appraised. That exception shows how strictly they were dealing with the buildings on the farm; for it provides for the case of one new house

then intended to be erected, as to which it distinctly provides that there should be an appraisement and compensation. That, in my opinion, very much aids the construction I am putting upon this contract, and counteracts the construction put upon it by the Court below; "and that the said William Gibson and his aforesaid are "to uphold these houses and biggings," that is to say, all the houses then on the farm, together with the biggings, "during the "whole space of this tack; and at the expiration thereof they are "again to be valued and appraised by two neutral men, to be "mutually chosen by both parties; and if at the said last appreciation the appraised value of these houses and biggings, including "the dwelling-house so to be built, shall exceed the values thereof "at the first appreciation, then the said William Grahame and his "foresaid shall be bound to pay or allow the meliorations to the said "William Gibson or his foresaid," not of any houses the tacksman might think proper to put upon the farm, but of those houses and biggings, that is, the houses and biggings existing at the time of the lease, and also the dwelling-house to be built immediately afterwards, for the time is specified. They leave us in no doubt as to that, for they again anxiously enumerate the dwelling-house; that if the value of these houses and biggings, including the dwelling-house so to be built, shall exceed the then values thereof, he is to receive compensation, and if it shall be less, then he is to allow for the pejoration, —which is a new term both to my noble and learned friend and myself, though perhaps a convenient one—he is to pay for those pejorations. Now, what ameliorations and what pejorations are to be taken into the account? If he had built a new house, and that new house had been worth less at the end of the lease than it had been at the former period of the lease, it is clear he would not have had to pay for that, for it would not have to be valued at the time of the entrance, and then at the expiration or ish of the lease. Then he ought not to receive for meliorations any more than for the meliorations on the houses and biggings, either then existing or by the substitution, which is distinctly referred to, of a new dwelling-house for a ruinous one, which is twice over in that part of the lease mentioned as the only exception, the houses and biggings in every other case meaning the houses and biggings existing at the time of the entrance on the lease. My Lords, I think it is material, both for the sake of landlords and tenants, to know, that if they are to receive at the expiration of the lease for meliorations, they are not at liberty to put on farms any kind of houses they may think fit, in the course of speculation, even though they may have been improvements at the time, nay, even

June 29, 1831.

June 29, 1831. though they are at the end of the term thought by two men who may be selected proper and suitable for the farm ; that the landlord is to be himself the judge of that. If it was to be carried further, the tenant ought to have bargained with his landlord, and not having done so, he has no right to complain, if, at the expiration of the term, he shall be left without reimbursement for his expenditure. The question is, what, by the terms of this lease, are the particular kind of meliorations ; what, as it regards different buildings, houses, and out-houses, are those, in respect of which the tenant stipulated for reimbursement, and the landlord contracted to pay ? Now, Ducat's case in 1803 by no means goes to this extent ; it only says, that a new house may be substituted for an old one, though twice as good as the old one ; and I observe the minority of the Judges by no means went so far as the majority. The other Judges did not feel themselves justified to consider so much what was proper and suitable for a farm, as what was the agreement between the parties ; a very rational view. In so far as it was larger, they considered it the erection of a new subject, and not a melioration of the old ; holding that if he had repaired the old, and not built a new one, this would have come within the contract ; and they felt it important that the Court should avoid making a bargain for the parties different from the one which they had themselves made, and which it was the Court's office to construe. The question is, what was the bargain between these parties ? and I have no doubt the bargain was, that the tenant should keep up the houses and build a new one instead of a ruinous one, a reasonable latitude being given ; and if any one of these houses was considerably larger than the old one, unless there was something exorbitant and unreasonably large, and wholly unsuitable to the state of the farm, that it would come within the construction of this bargain ; but I cannot, on the best consideration I have been able to give the case, say that all these houses (a great number of which were additional, as a smith's shop and a smith's dwelling-house,) can come within the description of those houses and buildings which are to be the subject of compensation. I should therefore submit to your Lordships the propriety of amending the interlocutors to the extent, that after the words purporting that Stewart Jolly " is entitled to meliorations " for houses and biggings," we should leave out, " whether repaired " or built of new," and going on, " in so far as the houses and " biggings on the farm at the dates of the tacks are improved, " or others suitable to the farm built in lieu thereof, but find, that " he is not entitled to any compensation for additional houses not " built instead of old." I should suggest to your Lordships the

propriety of amending this interlocutor, and remitting the case, June 29, 1831. leaving it to the further consideration of the Court. My noble and learned friend, I believe, will say something on the other branch of the case.

Lord Wynford.—My Lords, this case certainly is one of very considerable importance. It is fit, on the one hand, that we should protect the tenant. It is fit, on the other hand, that we should take care, while giving protection to him, that we do not give him a right which will enable him to ruin his landlord, which, I think, the tenant might do in some cases, if the law were carried to the extent to which the judgment of the Court below has carried it. The case has been reduced to two points; 1st, Whether these leases are binding upon the appellant; and, 2dly, The extent to which they are binding. It appears to be admitted, that but for the homologation the present appellant would not have been bound by the leases. I am of opinion, my Lords, that by homologation he has bound himself to all the covenants of that lease.. The most distinct homologation does not apply to the whole property. But there is another species of implied homologation which does apply to the whole, namely, the receipt of rent; and I think that it was impossible for this appellant to say that he had not acceded to every one of the covenants contained in the lease after having taken rent. He took advantage of the lease, and by taking that advantage he takes upon himself all its burthens. There cannot be a partial confirmation of a deed. In the cases cited it appears that in the law of Scotland receipt of rent is a confirmation, except in the case put and disposed of by the Lord Advocate. There the party could not set aside the lease, and on that account his acts, with respect to that lease, could not be taken as acts of homologation. In this case the party was in a situation to set aside the lease. That is admitted by the learned counsel on both sides. But it is said the party was not aware of the legal consequences of what he did. If he had been ignorant of the fact of such a lease being in existence, he would not have confirmed it by receiving rent. The maxim is, that ignorance of fact excuses, but ignorance of law does not excuse. It may seem strange that an ignorant man shall be presumed to know the legal consequences of his conduct, when it is often found that the most learned judges do not know these consequences; but it has been found that this presumption of knowledge of the law has promoted justice better than allowing the excuse of ignorance of the law to protect men would do. It would be absurd to say that a man confirmed an instrument he had not seen, but this gentleman did know of the deeds, and did receive

June 29, 1831.

rent according to those deeds; and therefore I conceive he must be taken to have sanctioned both the deeds to their full extent, and all the covenants contained in those deeds. I agree with my noble friend that the law does not oblige the landlord to pay for the erection or for the melioration of any building not on the estate before, except that which was about to be erected. We should be going beyond the words of the lease—we should be introducing into the instrument other words than those which the parties have put in it, if we were to say, that, under the covenant by which the party binds himself to allow for the melioration of those buildings, we were to oblige him to allow for the erection or melioration of buildings not in existence at the time. If any new building might have been included under the general terms of the lease, there would have been no reason for inserting that clause, to give the meliorations of that new building which was to be erected. That shows that the parties put that construction upon this instrument which I am advising your Lordships to give it. With respect to old buildings, I do not think that the landlord is bound to pay for enlargements of these beyond a size unnecessary for the cultivation of the farm when it came out of lease. At the same time I cannot say that he is to pay for no enlargement, if the melioration means something more than reparation. But the meliorations to be paid for by the landlord must be such as are permanent benefits to the estate. If the meliorations are adapted to a corn farm, and from the alteration in the times when the estate came out of lease that farm which the tenant had made a corn farm must be used again as a pasture farm, then meliorations are of no use to the landlord; they were more for the convenience of the tenant only, and he cannot request the landlord to pay for them. So I say of any other enlargement or alteration of the buildings, not useful to any new occupier, after the expiration of the lease; any meliorations that are useful to a new tenant must be paid for. Those which are not useful to a new tenant may be an addition to, but they are not, in the language of the lease, meliorations or improvements of the buildings. I think that the words introduced by my learned friend are sufficient to tie down the Court below, and prevent their compelling the landlord to pay for enlargements of the buildings, which, though they might have been convenient during the course of the lease, do not contribute to the benefit of the landlord at the expiration of that lease. My Lords, perfectly agreeing as I do with the noble and learned Lord, I shall conclude by seconding his motion, which is, in effect, that all the interlocutors of the Court below, with the exception of those of the 12th December 1827 and the 2d July

1829, be affirmed, and that those two interlocutors be reversed, and that the cause be remitted, with a declaration to the effect which has been stated, but without costs. June 29, 1831.

The House of Lords —————

Appellant's Authorities.—(1.) 2 Stair, 140. (3.) Campbell and Company, May 21, 1803; Brown's Synopsis, vol. i. p. 644; Fleshers and Candlemakers of Canon-gate, July 7, 1809; Wilson, Nov. 17, 1814; Falconer, March 4, 1815; Taylor, June 9, 1821.

Respondent's Authorities.—2 Erskine, 6, 29; Arbuthnot, Feb. 5, 1772; (Mor. 10,424); Walpole, Feb. 3, 1783; (Mor. 15,249); Morison, Feb. 3, 1787; (Mor. Dec. 10,425;) 3 Stair, 5, 17.

POWELL—M'CRAE,—Solicitors.

CHRISTIAN M'INTYRE, and others, Appellants. — *Lushington—* No. 24.
Rutherford.

M'NAB'S TRUSTEES, Respondents.—*Lord Advocate (Jeffrey)—*
Russel.

Landlord and Tenant—Removing.—Held (affirming the judgment of the Court of Session) that a tenant under a written lease must give notice forty days before Whitsunday of his intention to remove, otherwise he will be held to continue in possession by tacit relocation.

M'NAB, of M'Nab, disposed his estate in trust on the 12th of March 1812 to trustees, who were infeft, and allowed the estate to be managed by M'Nab. On the 28th of February 1813, he granted a missive of lease of the grounds of Portnellan to Duncan M'Intyre for seven years. M'Nab afterwards went abroad, and the estate was managed by Duncan M'Intyre, writer, in Callender, to whom the trustees granted a factory for levying the rents, but it contained no power relative to the removing of tenants. The lease was to terminate at Whitsunday 1820, and M'Intyre, the tenant, alleging that he had given notice of his intention to remove at that term, began to carry off part of his effects. The trustees denied that he had given any such notice, and proceeding on the footing that he had incurred a lia- July 8, 1831.
2D DIVISION.
Lord Pitmilley.

July 8, 1831.

bility for the rent of 1820-21, they presented a petition, on the 19th of May 1820, to the Sheriff of Perthshire, praying for sequestration in security of the rent, part due at Whitsunday, and also of the rent for the current year. M'Intyre paid the rent for crop 1820 prior to 26th May, and the sequestration was withdrawn in June thereafter. He then brought an action, concluding to have it found that he was not liable for the rent posterior to Whitsunday 1820, and for damages against the trustees in respect of the sequestration. In support of this he maintained, 1. That although a landlord is bound to give notice forty days before Whitsunday of his intention to remove a tenant, yet the latter is not bound to give any such notice of his intention to remove, or at least that only reasonable notice is requisite. 2. That he had in point of fact given notice orally to M'Intyre, the factor, more than forty days prior to Whitsunday, and on the 11th of April he had written to him to the same effect; and, as the rent was payable at Whitsunday old style, being the 26th of May, and this was the term for removing, sufficient notice had been given; besides, the trustees had, in the months of December 1819 and January 1820, advertised that the farm was to be let. On the other hand, the trustees stated, that the first notice which they received was on the 4th of May 1820; that their factor had no power to receive such notice; that, although the rent was not payable till the 26th of May, yet this was an indulgence to the tenant, and it was fixed by statute that the removing term was the 15th of May; that it was true that they had, in one advertisement embracing several of the farms on the estate, included that of Portnellan, but it was withdrawn on the faith that the tenant intended to remain in possession.

The Lord Ordinary, on the 11th of July 1823, pronounced this interlocutor:—" Finds, that the pursuer not having been
" warned by his landlord to remove from the farm of Portnellan
" as at Whitsunday 1820, when the lease was to expire, and the
" advertisement by the landlord of this farm being to let, along
" with several others, at the said term of Whitsunday, having
" been discontinued in the month of January 1820, while the ad-
" vertisement as to the other farms was continued, the pursuer
" was bound to intimate in due time to his landlord, or others
" authorised to act for the landlord, his intention to remove at

“ Whitsunday 1820 ; and finds, that if he failed to do so tacit July 8, 1831.
 “ relocation must have taken place, and consequently the claim
 “ of damages insisted in by the pursuer would not be well
 “ founded ; but in respect the pursuer offers to prove, in the
 “ fourth article of his condescendence, that he actually made said
 “ intimation in due time to Duncan M'Intyre, the late factor,
 “ before the factory was recalled, or at least before the recal of
 “ the factory was intimated to the pursuer ; while these asser-
 “ tions are denied, and the facts are differently stated and ex-
 “ plained in the fourth article of the answers, Allows the pursuer,
 “ before answer, a proof of the said fourth article of his conde-
 “ scendence, and the defender a proof of the fourth article of his
 “ answers, and also of the third article of the answers, with re-
 “ gard to the time at which the pursuer's treaty with the Earl of
 “ Breadalbane, or his Lordship's factors, for a renewal of the
 “ lease of the farm of Benmore, broke off,” &c. On advising
 the proof which was taken, his Lordship, on the 28th of Novem-
 ber 1828, pronounced this judgment :—“ Finds it not instructed
 “ that such notice was given by the tenant in this case as to ex-
 “ clude tacit relocation, and bind and entitle him to remove from
 “ the farm, and deliver over his stock to the defenders, on valua-
 “ tion, at the time alleged by the pursuers : therefore sustains
 “ the defences, assoilzies the defenders, and decerns : Finds
 “ neither party entitled to expences.”

In the meanwhile M'Intyre had died, and Christian M'Intyre and others were sisted in his place as his representatives. Both parties reclaimed ; the pursuers on the merits, and the defenders as to expences.

The Court, on the 11th of December 1829, adhered on the merits, but altered and found the defenders entitled to expences.*

M'Intyre and others appealed, and repeated their statements, and the argument which had been maintained in the court below, in regard to notice not being requisite. They also contended that the sequestration was illegal and oppressive, seeing that the rent was not payable till the 26th of May. The respondents, on the other hand, contended that notice was requisite ; that notice had not been given ; that the factor had

* 8 Shaw and Dunlop, 237.

July 8, 1881. told the tenant that he, the factor, had no authority to receive notice; that tacit relocation had taken place; that although the rent was not payable till the 26th, it was due on the 15th of May; and that, at all events, as the tenant had begun to remove his effects, they were entitled to have them sequestered in security of the rent for the current year.

Lord Lyndhurst.—My Lords, in the case of an English tenancy, under a lease for a certain time, it is not necessary, either on the part of the landlord, or on the part of the tenant, that any notice should be given, for the purpose of effecting the termination of the interest at the period when it is to expire; but that is not the case in Scotland. As far as relates to the landlord, it is perfectly clear, that where there is a lease for a period of seven years, for instance, as in the present case, the interest of the tenant does not expire at the end of the seven years, unless the landlord gives forty days notice, previous to the expiration of the term, of his intention that the interest should cease; if he omit to give such notice, the interest goes on for another year. The same degree of certainty does not, undoubtedly, exist with respect to the necessity of a notice on the part of the tenant; and the main point in this case is, whether or not a similar and corresponding notice is necessary on the part of the tenant. In the Court below, the Judges state that they have never heard the matter doubted; that as forty days notice was necessary to be given by the landlord, for the purpose of terminating the interest of the tenant, so a corresponding notice was necessary to be given by the tenant, for the purpose of putting an end to his interest. My Lords, the authorities cited appear to me, upon the whole, to establish this proposition, that forty days notice is necessary on the part of the tenant. Lord Stair says, that “tacks cease
“by the expiry of the terms thereof, and the letters warning, or
“other deeds, to take off tacit relocation, or the tenant’s renun-
“ciation, the form whereof is — the tenant, forty days before Whit-
“sunday, subscribes and delivers to his master a renunciation of his
“tack and possession, consenting that he enters, brevi manu, without
“hazard of ejection; whereupon there must be taken an instrument
“of renunciation in the hands of a nottar, as a solemnity requisite,
“which is sufficient to instruct the overgiving, as being the habile
“way approved in law; albeit, in other cases not approved in law,
“instruments of intent prove not the deed of the party. In this
“case it avoideth the tack, and is provable by instrument, if the
“tack be expired, but during the tack, the instrument will not prove
“the acceptance of the renunciation.” Lord Bankton says, “It

July 8, 1881.

“ takes place from the tacit consent of the parties, when neither the heritor warns, nor the tenant renounces in due time. If this is not done forty days before the Whitsunday at which the tack expires, both parties are fixed for the ensuing year.” From these, and the other authorities which have been relied on, I have come to the conclusion, upon the whole matter, that where a lease is granted to a tenant for a certain term of years, the tenant cannot quit at the expiration of his term, unless he has given forty days notice, previous to the expiration of that term, of his intention to quit. If that be the law, then the question is, as to the application of that law to the facts of this case. / A person of the name of Mac Intyre, who is a solicitor by profession, residing at Callender, was appointed, in consequence of the embarrassment of the lessor's affairs, factor, to receive and collect the rents. He was appointed, by an express and special authority for that purpose, to receive and collect the rents, and, in case of non-payment, to enforce payment. But he had not, by virtue of the power with which he was invested, any authority whatever to receive notices to quit. It appears to me, therefore, that any notice served upon him by the tenant, of his intention to quit, was not a sufficient notice to put an end to the term. In addition to this, Mac Intyre, the factor, states, that on some occasions when a vague communication was made to him by the tenant of his intention to quit, he, the factor, communicated to the tenant that he had no authority to receive the notice. It was necessary that the notice should be served on the landlord, and it does appear that notice was given; but I believe the earliest period to which that notice can be referred is the 27th of April — certainly it cannot be referred to a period so long as forty days before the expiration of the term. I think, therefore, upon this point, that the judgment of the Court below was right, and shall advise your Lordships to affirm it. I am of opinion that, the landlord not having received notice, the tenant had no right to quit at the expiration of the seven years, but that he was bound to continue his tenancy for the period of another year. My Lords, there is another point which is stated to have been insisted upon in the Court below. On reference to the report of the case, it does not appear to have been agitated at the Bar; but it is stated by Dr. Lushington, that, in point of fact, that point was argued, although the Court took no notice of it in their judgment. A sequestration was issued for the purpose of enforcing the payment of rent which was due at Whitsuntide, amounting to 55*l*., and that sequestration was issued, not merely for the purpose of enforcing the payment of that sum, but for the purpose also of securing the rent for the current year, founded upon this circumstance, that as the tenant contended that he had a right to quit the premises, and

July 8, 1831. was preparing to quit and carry his stock off the farm, though, in other respects, he might be a solvent and substantial man, the landlord had a right, by a distress upon the premises, to secure the rent which was accruing. With respect to the first object for which the sequestration was issued, I think some doubt may be entertained. It does not appear when the factor's authority to receive that rent ceased. It is stated that that authority ceased about the middle of the month of May; but it appears that, in the course of the month of May, a further order to receive this rent was made to the factor; and if he was at that time authorized to receive it, or if he had been previously authorized to receive the rent, and no communication of the ceasing of his authority had been given to the tenant, it appears to me that the tender to the factor of the rent then due would have been such a proceeding as would have barred the right of the landlord to issue a sequestration for that rent. But, my Lords, I have stated that the sequestration issued was not merely for the purpose of securing that rent, but the sequestration was also for another purpose — that of securing the rent of the current year. Now, it is stated at the Bar, that the current year had not commenced. I am of opinion that the current year had commenced. I am of opinion that, by the law of Scotland, the current year commenced upon the 15th of May, and that it was not postponed to the 26th. Whitsunday is fixed, by a positive Act of Parliament — an Act of the Scottish Parliament, for the purpose of getting rid of the inconvenience of moveable feasts — at a precise day, namely, the 15th of May. I am of opinion, therefore, that the rent of the previous year was payable on the 15th of May, and that the new year commenced at that period. I think, under the circumstances of this case — the tenant insisting upon his right to quit the farm, and he being about to move his stock from the farm, in the exercise of the right claimed by him — the landlord had a right to issue a sequestration by way of security for the rent due for the current year, as it is stated in the very instrument of sequestration, not insisting on any right at that time to have a warrant for the purpose of selling the stock, but merely for the purpose of enforcing his security under the circumstances in which this party was placed. I think, therefore, that, the tenancy commencing at Whitsunday, and Whitsunday being, by the law of Scotland, the period for commencing the current year, the sequestration was regular, for the purpose of enabling the landlord to enforce his security for the rent of the current year. It does not appear to me that the tenant has sustained any injury, even if he should be right in saying that the landlord had no right to issue the sequestration solely for the rent supposed to be in arrear for the preceding half year. Under these circumstances, I should recom-

mend to your Lordships, on both these points, to affirm the decision of the Court below. July 8, 1881.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—2 Ersk. 6, 45; Stat. 1555, c. 39; Bell on Leases, p. 497; Gordon, 13th January 1803 (13,854).

Respondents' Authorities.—2 Stair, 9, 34; 2 Bankton, 9, 32; 2 Ersk. 6, 35; Bell on Leases, p. 497; Bryson, 28th July 1744, Kilk.; Earl of Haddington, 24th February 1693, 1 Fount. 565; Duke of Athol, 15th March 1819 (F. C.); Gordon, ut supra.

SPOTTISWOODE and ROBERTSON, — JOHN M'QUEEN, —
Solicitors.

ROBERT GRAY and JOHN WOODROP, Appellants.—*Campbell—Spankie.* No. 25.

JAMES M'NAIR, Respondent.—*Lushington—Kaye.*

Arbitration.—Held, (affirming the judgment of the Court of Session,) that although interim decreets arbitral had been subscribed, given to the clerk, and copies sent to the parties, yet as the submission was terminated without any final judgment and the decrees had never been delivered or recorded, they were null.

GRAY and Woodrop were proprietors or tenants of a field of coal in the lands of Westmuir, and Gray was proprietor of the adjacent coal situated in the lands of Greenfield. The coal of Greenfield stands upon a higher level than that of Westmuir, and the descent of the water from the one field to the other was prevented by a barrier which had been allowed by tacit consent to remain between the two fields. M'Nair conceiving that he was not bound to refrain from working this barrier, commenced operations upon it, whereupon a dispute took place, and the parties agreed to submit it to the decision of James Farie and Colin Dunlop. A regular deed of submission was in consequence executed in October 1823, with power to the arbiters “to pronounce decree or decrees partial or total,” “to do every

July 8, 1881.
2D DIVISION.
Ld. Mackenzie.

July 8, 1831. " thing necessary for bringing the matter submitted to a just
 " and speedy issue, and whatever decree or decrees, partial
 " or total, interim or final, the said arbiters in one voice shall
 " give forth and pronounce betwixt, and the day of "
 &c. " the said parties oblige themselves to fulfil and perform,"
 &c. " Declaring that the said arbiters shall not have power to
 " name an oversman to decide between them in case of their
 " differing in opinion, but that in case of their so differing in
 " opinion this submission shall fall and expire."

On the 18th of August 1824 the arbiters subscribed a regular interim decree arbitral, containing a clause of registration in these terms: " Therefore we, the said James Farie and Colin
 " Dunlop, arbiters aforesaid, do hereby, in one voice, pronounce
 " and give forth our interim-decision and decreet arbitral upon
 " the foresaid submission in reference to us, and the terms and
 " manner following; viz. we find that the said James M'Nair
 " never had and has now no right to cause the water of the
 " Prickleymuir or Upperfield of coal mentioned in the said sub-
 " mission, and belonging to him, to run or issue so as to flow
 " into the Westmuir colliery, belonging to or possessed by the
 " said Robert Gray and John Woodrop, his partner, mentioned
 " in the submission, or to carry on any operation which may
 " produce that effect; and we prohibit and discharge the said
 " James M'Nair and his successors from doing so: and in the
 " event of the said James M'Nair or his foresaids contravening
 " the finding and prohibition above written, we find him liable
 " to the said Robert Gray and John Woodrop, and their suc-
 " cessors, in the damages to be sustained in the Westmuir col-
 " liery on that account; and we decern and ordain the said
 " James M'Nair and his foresaids to abide by our decision and
 " decreet above written, and to observe and fulfil the same, to
 " and in favour of the said Robert Gray and his foresaids, under
 " the said penalty of 500*l.* sterling, to be paid, in case of failure,
 " besides performance, as specified in the foresaid submission:
 " and we reserve the further consideration and determination of
 " the other points referred to us, as aforesaid, in the event, that
 " the parties shall not adjust and settle the same by an amicable
 " compromise between themselves, within thirty days from and
 " after the date hereof: and we again earnestly recommend to
 " the said parties to make such settlement and compromise."

July 8, 1831.

This decree was placed in the hands of the clerk to the submission, and copies of it, certified by the clerk, sent to the parties. But it was neither delivered to them, nor put upon record. Thereafter M'Nair began to carry on a dook-working, from which he raised water by means of a pump to a level from which it found its way into Gray's coal work, and this having been complained of to the arbiters, they, on the 5th of January 1825, (after having previously granted an interim interdict,) subscribed, along with their clerk, a second interim decree, whereby they found that the said James M'Nair neither had "nor has any right or title, by a pump or any other artificial means, to raise water from a level lower than the opening between his colliery and the Green colliery or waste, so as to make the said water issue through that opening into the colliery of Westmuir, belonging to or possessed by the said Robert Gray and John Woodrop, his partner; find that, from the last report of James Merry and John Wilson, the inspectors aforesaid, dated the 14th September last, the said James M'Nair was then using a pump in his said colliery for the purpose, and that had the effect above mentioned; and therefore we decern and ordain the said James M'Nair immediately to cease using the said pump for the purpose, or so as to have the effect aforesaid, and prohibit and discharge him from resuming or exercising any such operation in his said colliery hereafter. And further we find the said James M'Nair liable to the said Robert Gray, for and in behalf of himself and the said John Woodrop, his partner, in the damages occasioned to them in their said colliery of Westmuir by the use of the said pump as aforesaid, from and after the said 19th day of May last (the date of the interlocutor above mentioned), and allow the said Robert Gray to give in a consignment of the damages claimed by him on that account. And we decern and ordain the said James M'Nair and his foresaids to abide by our interim decision and decree arbitral above written, and to observe and fulfil the same, to and in favour of the said Robert Gray and his foresaids, under the said penalty of 500*l.* sterling, to be paid in case of failure, besides performance, as specified in the foresaid submission. And we reserve the further consideration and determination of the other matters referred to us as aforesaid." This decree

July 8, 1831. contained a clause of registration, was delivered to the clerk, and copies of it, certified by the clerk, sent to the parties, but it was neither given up to them nor recorded.

About this time the Court of Session had pronounced a judgment in the case of Harvey, 26th November 1824,* sanctioning the doctrine, that unless there was a special contract, law did not require that a barrier should be left between two adjacent coal fields; and, in consequence of this decision, it was alleged that one of the arbiters became satisfied that they had no right to prevent M'Nair from working the barrier, while the other was of a different opinion. Gray and Woodrop then insisted that the clerk should deliver to them the two interim decrees, and in consequence he laid before the arbiters this memorial: " On the 18th of August " 1824 the arbiters subscribed an interim-decreet arbitral in the " said submission, and on the 5th of January last they sub- " scribed another interim-decreet arbitral therein. A copy of " each decree was immediately after sent by the memorialist, " with the permission of the arbiters, to the parties respectively, " or their agents; and the decreets themselves have remained " in the custody of the memorialist as clerk to the arbiters. " Mr. Mitchell, as agent for Mr. Gray, has, both by letter and " personal application, insisted that the memorialist shall put " the said two interim-decreets upon record in a competent " register; and, on the other hand, Mr. Murray, as agent for " Mr. M'Nair, has, in like manner, insisted that the memorialist " shall not part with the said interim-decreets for any purpose " whatever, except by the special authority of both the arbiters, " as instructed by the letters of these gentlemen respectively to " the memorialist laid before the arbiters. The memorialist, " as clerk to the arbiters, considers himself entirely under their " direction and control in this question; and, in the circum- " stances above stated, the memorialist finds it indispensably " necessary to apply for and procure the instructions and autho- " rity of the arbiters to direct his procedure upon the opposite " demands now urged by the parties in the submission respec- " tively; and the memorialist craves the instructions and order " of the arbiters accordingly."

* 3 Shaw & Dunlop, 322.

On considering this memorial, the arbiters, on the 6th of April 1825, issued this deliverance: "We, James Farie and Colin Dunlop, the arbiters in the submission within written, having taken into consideration the account of the expences incurred to Thomas Falconar, our clerk, for business done by him under the submission, amounting to 30*l.* sterling, find the same justly stated, and Messrs. Robert Gray and James M'Nair, the parties submitters, jointly and severally liable in payment thereof to the said Thomas Falconar; decern and ordain them to make payment thereof to him accordingly, and to relieve each other equally of the same. And we having likewise taken into consideration a memorial for the clerk to the submission, dated the 1st of April current, decline to give any deliverance thereon, and quoad ultra, we declare the submission terminated. In witness whereof," &c.

July 8, 1831.

Immediately thereafter the parties presented petitions to the sheriff of Lanarkshire, the one praying that the clerk should be ordained to deliver up the interim decrees in order to be recorded, and the other that he should be interdicted from doing so; and the clerk, with the view of obtaining judicial exoneration, raised a process of multiple-poining before the Court of Session, and the petitions were thereupon advocated ob contingentiam. M'Nair also instituted an action concluding to have the interim decrees reduced and set aside, or at least to have it declared that they were null and void.

In defence, Gray and Woodrop maintained that, as the arbiters had full power to pronounce interim decrees, and they had done so, and issued copies to the parties on which they had acted, the decrees were good and effectual; while, on the other hand, M'Nair contended that, as the interim decrees remained in the hands of the clerk, and so were within the power and control of the arbiters, they had never been delivered; and as the arbiters had declined to authorize the clerk to give them up, and had declared the submission at an end, they had necessarily been revoked, or at least were ineffectual. The Lord Ordinary reported the question to the Court on cases.* On advising the cases, the

* As a practical illustration of his argument, M'Nair stated that the Lord Ordinary had pronounced and subscribed a judgment in his favour, accompanied by a full note of his opinion, but that before issuing it he deleted it, and took the cause to report.

July 8, 1831. Court *, on the 31st of May 1827, pronounced this judgment;
 “ In the reduction and declarator, in respect that the interim
 “ decreets-arbitral were neither put on record nor delivered to
 “ the parties, find it unnecessary to reduce the said interim
 “ decrees, the same never having been complete or valid decrees-
 “ arbitral; but, in terms of the declaratory conclusions, find the
 “ same to be null and void, and declare the submission termi-
 “ nated and the parties released therefrom: in the advocations
 “ and multiplepoinding, find it unnecessary, in respect of the
 “ above findings, to give any farther judgment; and, in the
 “ whole conjoined processes, find no expences due to either
 “ party, and decern.” †

Gray and Woodrop appealed.

† 5 Shaw and Dunlop, 735.

* *Lord Pitmilley* observed, It is necessary to consider together both of the objections taken to these decrees-arbitral by the pursuer, as the second aids the first very much. As to the first, if both the arbiters had concurred in wishing to recall the decrees, I have no doubt but that they might have done so to the very last. The case of *Robertson* is an authority in point; and the opinion of Lord Braxfield is entitled to great weight; and when, on a point of pure Scotch law, we find such authority, I am not inclined to go further; nor is the case of *Simpson* a contrary authority, as the arbiter there was functus. If, then, it was competent for both to recall the decrees, I do not think it alters the matter that one only refuses to deliver them. The second objection confirms the first, as the arbiters declare the submission at an end, because they differ on the points decided in the decrees already pronounced, of which I think there is sufficient evidence. If they did not exhaust the whole matter referred to them, the submission flew off; and I therefore think that both objections are well founded.

Lord Alloway.—I take a different view of this question. So far as we are to proceed on authority, there is none exactly applicable to this case. In the case of *Simpson* there was a positive decree cancelling the former one. There is nothing of that kind here, and I hold the decrees in this case to have been regularly issued, the clerk having sent copies to both parties, and the arbiters themselves stating in the second decree that the first was issued. It seems to be conceived that the arbiters could not give a decree till they had settled the whole matters in dispute; but it was provided by the submission that they might give interim decrees, and that, if they afterwards differed, they might give up. I cannot hold that they differed on the subject of these two decrees, as we cannot resort to the examination of the arbiters to explain their decree, or receive their evidence.

Lord Justice Clerk.—I concur with Lord Pitmilley. We have here a memorial by the clerk, asking leave of the arbiters to record the decrees. This they refuse, and I cannot hold them delivered by copies being sent to the parties. The word “issued,” used by the arbiters in the second decree, is employed in the same sense as we talk of issuing notes, merely communicating them to the parties, but not delivering them as valid decrees. To constitute delivery, it must be the principal, and not a copy,

July 8, 1831.

Appellants.—The ground on which the judgment of the Court below rests is, not that the arbiters had no power to pronounce the decrees in question, but that these decrees, although pronounced, required actual delivery or registration to make them effectual. This, however, is not consistent with law, and is at variance with practice and with the case of *Simpson v. Strachan*, where it was decided, that neither actual delivery nor registration is essential to the validity of a decreet-arbitral. In the case of *Robertson*, relied on by the respondent, the only point decided was, that an arbiter, before either delivery or registration, may alter his decree; but in the present case there was no alteration, nor is there evidence of even an intention to alter. On the contrary, the arbiters left the question to be decided on the assumption, that if it should be held that the decrees were lawfully issued, effect should be given to them. Besides, the clerk was authorized to deliver a copy of those interim decrees; and his having done so was equivalent to delivery of the award itself. There is also the important circumstance, that the second decreet-arbitral recites the first, and states it as an “issued” decreet-arbitral, which is equivalent to a declaration of the arbiters that the first decreet-arbitral was complete.

Respondent.—In the case of *Robertson* it was decided, that an award, though signed by the arbiters and delivered to the clerk, might be altered by them, and that they do nothing effectual until the decreet is either delivered or registered. In the present case the decrees remained in the hands of the clerk, or, in other words, in those of the arbiters, and they not only refused to deliver them, but declared the submission at an end. The case of *Simpson* is inapplicable, because there the submission had expired, and the decision was, that the arbiter, being *functus officio*, he could not afterwards alter it.* But in the present case the submission

which is delivered; and I conceive that the case of *Robertson*, and the opinion of Lord Braxfield, directly apply. As to the other objection, I have also great difficulty. It does not appear to me to be a case where the clause in the submission applies; but the first is sufficient to decide the case.

Lord Glenlee.—I am of the same opinion.

* The respondent quoted, from the session papers of *Simpson v. Strachan*, the following case, which does not seem to be reported: “A submission was entered into by Mortonhall on the one part, and his sister, with William Ross her

July 8, 1831. was subsisting. Besides, although power was given to the arbiters to issue interim decrees, this was on the condition that they should proceed to pronounce a final judgment; but they refused to do so, and consequently the whole fell to the ground. Neither the authorized delivery of a copy of the decreets, nor the reference in the second to the first as an issued decreet, can operate favourably to the appellants.

Lord Lyndhurst.—My Lords, the question in this case was a technical question of Scotch law, arising out of the execution of a decreet-arbitral. There was a reference to certain arbitrators, and by the terms of the reference the arbitrators had authority to pronounce decree or decrees partial or total. They had no authority, in case they differed in opinion, to call in any umpire, and therefore, if they differed in opinion on any point, that point would have to remain unsettled; but, when they concurred in opinion, they had authority to pronounce partial or total decrees; and whatever decrees, partial or total, interim or final, the arbiters pronounced, the parties obliged themselves to fulfil and perform. In the month of August 1824 they pronounced their first interim decree, and in the month of January following they pronounced their second interim decree. Those decrees were drawn up, and were signed by the respective arbitrators, and copies, certified by the clerk whom they had appointed, transmitted to the parties. If those decrees were to be viewed according to the law of England, and the transaction had taken place in this country, they would have been operative and binding awards. But this question is not to be decided by English, but to be decided exclusively by the rules and law of Scotland. Standing here as I do (or rather as I did

“husband, on the other part. The arbiters, when the submission was near expired,
 “decerned Mortonhall to pay certain sums to Ross; and they kept the decree in their
 “own hands. Ross's creditors did, soon thereafter, arrest these sums in the hands of
 “Mortonhall; and subsequent to the arrestment Ross granted a declaration, sus-
 “pending the payment of certain of these sums till he should have secured his wife
 “in a jointure at the sight of the arbiters, who had refused to give out and publish
 “the decree-arbitral till this was done. In a furthcoming the creditors urged, that
 “there was a *jus quæsitum* to them by the decree-arbitral and their arrestment, the
 “effect of which could not be restrained by any deed of Ross or the arbiters, after
 “the right they had acquired by their arrestment on the said decree-arbitral. It
 “was answered, that so long as the decree, though pronounced and signed, re-
 “mained in the hands of the arbiters, it was their own, and they might give it
 “forth or not as they thought fit; and therefore they might give it out on such
 “terms as they pleased; and such condition thereby became as strong as if it had
 “been a quality engrossed in the decree; which answer the Lords sustained.”

July 8, 1831.

when this case was argued before your Lordships at your Lordships bar) *, more as an English than a Scotch lawyer, certainly all my feeling was in favour of the validity of those decrees, and my inclination was to sustain them; but, having considered the subject frequently since, I am compelled to say, that, according to the law of Scotland, those decrees are not binding decrees. By that law, in order to render a decret-arbitral binding, it is not sufficient that it should be drawn up in form, and signed by the arbitrators, and retained in their possession, or in the possession of their clerk; but something further must be done—the decree must either be delivered or entered on record, or some authority at least must be given for the purpose. It may be assimilated to the execution of a deed in England, which is also a technical instrument, and which requires technical forms to be complied with. With us, in the execution of a deed, it is not sufficient that it should be signed by the party to be bound by it—that it should be sealed by the party to be bound by it—and that it should be attested. Another circumstance is necessary—it must be delivered; and, unless it be delivered, it is not binding. Now, my Lords, this being according to my apprehension and understanding of the law of Scotland, we must apply it to the facts of this case. The first interim decree was made in the month of August 1824, the second in the month of January following. They were signed by the arbitrators, and left in the clerk's possession. They never were out of his possession. I consider the decreets-arbitral, under the circumstances I have stated, not as decreets-arbitral, but as decreets-arbitral intended to be decreets-arbitral, when completed by a delivery, or by being entered on record. But it is stated that there is a fact in this case which is equivalent to a delivery. In this case the arbitrators authorized their clerk to deliver out a copy of the decreets-arbitral intended to the parties. It was delivered; and it is said that a copy being so delivered is equivalent to the formal delivery of the award. I think it has not that effect. I cannot recommend your Lordships to go the length of saying it has that effect. Before the decret-arbitral is delivered, it is merely a decret-arbitral intended to be delivered as a decret-arbitral—intended to be a judgment pronounced; and therefore the copy, before it was delivered, is nothing but a copy of what was intended to be delivered—is nothing but a copy of judgment intended to be pronounced, and clearly not equivalent to a decret pronounced or delivered. But then there is another circumstance that was also

* The case was heard in when his Lordship was Lord Chancellor.

July 8, 1831. suggested, and which struck me at the time as being entitled to very considerable weight. The second decret-arbitral recites the first, and in reciting the first it states it is a decret-arbitral that had been "issued;" and it appeared (as it was contended) that this amounted to declaration by the arbitrators themselves, that the first decret-arbitral was a complete decret-arbitral. But I think, on consideration, it has not that effect. If there were any thing in it certain or positive as to the first, it might admit of this construction; but the circumstance of its being stated in the second decret-arbitral to have been issued must be considered with reference to the evidence and state of facts, and cannot be considered in itself as amounting to making a complete delivery—a complete decret-arbitral of the first—when, in point of evidence and fact, the first was never delivered at all. Upon this ground, therefore, and from the explanation given by one of the Judges below, that it is an expression constantly used where notes only are issued, it does not appear to me to conclude this question. This further observation also arises with respect to this view of the case—that the second decret-arbitral, which states the first decret-arbitral to have been issued, never was a complete decret-arbitral itself, but simply was a decret-arbitral intended to be complete; therefore, there is the less reason to give to the first the character of a complete decret-arbitral, merely from being recited in the second, which itself was not a complete decret-arbitral. I, therefore, my Lords, am bound to come to the conclusion, according to my judgment, that, according to the law of Scotland, what has taken place in this case does not amount to a delivery of the decreets-arbitral. They continued, up to the time when the arbitration was terminated, in the possession of the clerk of the arbitrators. A memorial was presented to the arbitrators by the clerk, to know what was to be done with respect to those decret-arbitrals. In answer, the arbitrators stated that they could give him no instructions. They never, therefore, directed him to deliver those decret-arbitrals—never agreed to deliver, nor was the clerk directed to put them on record. They never agreed, therefore, that they should be complete decret-arbitrals. I am of opinion, consequently, that they cannot be considered complete decret-arbitrals; and under such circumstances I should recommend your Lordships to affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—4 Ersk. 3, 33; Lovat, June 17, 1738 (625); Halkerston, June 30, 1625, (645); M'Callum, June 3, 1825 (4 S. & D. 66, and ante, Vol. 2.

344); Simpson, Dec. 10, 1736 (No. 2, Elchies Arbit. and 17,007); Woodrop, Feb. 4, 1794 (628); Glover v. Glover, 1802 (Wilson's Digest, House of Lords).

Respondents' Authorities.—Robertson, June 20, 1783 (653); 2 Hailes, 912; Maxwell, Dec. 19, 1561 (643).

RICHARDSON and CONNELL,—MONCREIFF, WEBSTER,
THOMPSON,—Solicitors.

JOHN CATHCART of Genoch, *Appellant.*—
Dr. Lushington—Greenshields.

No. 27.

SIR JOHN ANDREW CATHCART Bart. and Curator, *Respondent.*—
Lord Advocate (Jeffrey)—Rutherford.

Tailzie—Stat. 1685.—An heir of entail was in possession of estates under an entail, restraining him by effective prohibitory, irritant, and resolute clauses from altering the order of succession, but not (as he considered) from contracting debt—circumstances in which (affirming the judgment of the Court of Session) the debt he contracted was regarded not to be a real debt, but the whole to be a collusive and simulate contrivance, with the view not to contract a true debt, but to alter the order of succession, and therefore the transaction was reduced at the instance of the next heir of entail.

The reading of the Statute 1685, that a defect in any part of the statutory requisition of an entail vitiated the whole entail, as well in questions with creditors as inter hæredes—rejected by the House of Lords.

SIR ANDREW CATHCART of Carleton, Bart., made up titles, was infest in and possessed, as heir of entail, the estates of Carleton and others in Ayrshire. The entail was contained in a marriage contract executed in 1717, and in a procuratory of resignation, dated 1722, under reserved powers in the marriage contract. The prohibitory clause in the entail was in these words:—
“ That it shall not be lawful to nor in the power of the said
“ John Cathcart, nor any of the heirs of tailzie and provision
“ above specified, to alter, innovate, or change this present tail-
“ zie and order of succession, or to sell, alienate, or dispo-
“ ne, neither irredeemably nor under reversion, nor yet to wedsett
“ or burden with infeffments of a'rent, nor any other servitude or
“ burden, the tailzied lands and estate above wryten whatsom-

July 18, 1831.

1st Division.
Lord Moncrieff.

July 18, 1831. “ ever, or any part thereof, except in the cases and in the way
 “ and manner above provided,” (these relating merely to family
 provisions,) “ nor to sett tacks nor rentalls of the samen for any
 “ longer space than nynteen years, or the setter’s lifytyme, and
 “ without diminution of the rentall, except in the cases of neces-
 “ sitie, where a sufficient tennent cannot be found to pay the
 “ whole rent, nor to doe no other fact or deed, civill or crimi-
 “ nall, directly or indirectly, in any sort, whereby the said tailzied
 “ lands and estate, or any part thereof, may be affected, apprised,
 “ adjudged, forfaulted, or any other way evicted from the said
 “ heirs of tailzie, and this present tailzie and order of succession
 “ thereby prejudged, hurt, or changed.” The deed of entail
 also provided, “ That the said John Cathcart and the heirs of
 “ taillie above mentioned shall bruik, enjoy, and possess the
 “ said tailzied lands and estate by vertue of this present tailzie,
 “ infestments, conveyances, and rights to follow hereupon, and
 “ by no other right or title whatsoever.” These provisions
 and prohibitions are fortified by the following irritant and
 resolute clauses:—“ Declaring allwayes, that if the saids heirs-
 “ female and descendents of their bodies succeeding to the saids
 “ lands and estate shall failzie to assume, bear, and use in all
 “ tyme thereafter the sirname, arms, title, and designation above
 “ wryten, or that the said John Cathcart, or any of the heirs of
 “ tailzie, shall contraveen or fail to fullfill the conditions and pro-
 “ visions of this present tailzie, or any one of them, any manner
 “ of way, and specially, but prejudice of the generality forsaid, by
 “ alltering or changeing the order of succession, or dispoeneing,
 “ selling, wadsetting, or burdening with infestments of a’rent, or
 “ other servitudes and burdens, the saids lands, or any part
 “ thereof, otherwaies than is as above provided; or by provideing
 “ their spouses in liferent provisions of the lands and others fore-
 “ said, exceeding a third part of the free rent of the samen, or by
 “ infesting and securing their spouses, male or female, in any
 “ a’rents or annuities to be uplifted out of the saids lands, but in
 “ the lands themselves, or by burdening the samen, for provision
 “ of the daughters or younger children, with more than the sum
 “ of ten thousand merks, in manner above provided; or by
 “ granting absolute or irredeemable dispositions for payment of
 “ the saids provisions or a’rents thereof; or by granting infest-
 “ ments of a’rent for the saids provisions; or by not inserting in

“ every bond, securitie, or obligation which shall be granted for July 18, 1831.
“ the sums wherew^h they are allowed to provide their younger
“ children, the particular clauses and provisions above appointed
“ to be insert therein ; or by granting tacks and rentalls other-
“ waies than as above ; or by contracting debts, except in so far
“ as they are empowered in manner above mentioned ; or by
“ doeing any other fact or deed, civill or criminall, whereby the
“ s^d lands may be burdened, evicted, forefaulted, or adjudged ;
“ or by possessing of the saids lands by vertue of any other title
“ or right than this present tailzie, infestments and conveyances
“ to follow hereupon ; or by not inserting in their severall rights
“ and conveyances the haill conditions and irritancies hereof ; or
“ by lying out unentered, or by not paying the saids casualties
“ of superiority, or other publick burdens, whereby the said
“ estate may be anywayes adjudged or evicted for the samen, or
“ by not purgeing of the saids adjudications at least two years
“ before the legall expire : That then, and in these or any of
“ these cases, not only all such facts and deeds committed, done,
“ or contracted contrair hereunto, with all that may follow
“ thereon, shall be of themselves void and null, and of no force,
“ sikelike as if the samen had never been done, contracted, or
“ committed, in so far as concerns the saids lands and estate
“ above exprest, which, nor no part thereof, shall be anywaies
“ affected or burdened therewith in prejudice of the saids heirs of
“ tailzie and provision above specified, appoynted to succeed by
“ vertue of these presents, which are made and granted sub modo,
“ with and under the provisions above specified, and no other-
“ waies : And also the persone or persones so contraveening, or
“ failzing to fullfill the above-wryten conditions or irritancies or
“ any of them, shall for themselves ipso facto lose, amitt, and
“ forfault their right and interest in the saids lands and estate,
“ and the samen shall become void and extinct ; and it shall be
“ lawful for the nixt heir of tailzie who would succeed if the con-
“ traveener were naturally deed, albeit descended of the con-
“ traveener's body, to purchase and obtain declarators upon the
“ contravention or failzeing to fullfill any of the saids provisions
“ and conditions, or to obtain themselves served and retoured,
“ infest and seised in the saids tailzied lands, in the same way as
“ if the contraveener were naturally dead : In respect the right
“ of the said contraveener is hereby declared to be void and

“ extinct, as said is, and the right of succession of the foresaids
 “ lands and estate is hereby provided to devolve and pertain to
 “ the nixt heir of tailzie, and the persone so succeeding, and
 “ all the subsequent heirs of tailzie, shall be lyable to the same
 “ irritancies.”

Sir Andrew being anxious to alter the destination in the entail and procuratory, and being led to think that this might be accomplished in consequence of a supposed defect in the prohibition against contracting debt, in March 1821 consulted counsel on these points, and was assured in answer that the entail did not contain proper and effectual prohibition against the contraction of debt, and that Sir Andrew was entitled to come under an obligation of debt, which obligation would be effectual against the property. Counsel also described the method which Sir Andrew should adopt in order to hold the estates unfettered by the entail.

July 6 and 25,
1717.

Sir Andrew Cathcart submitted the following memorial to Mr. John Clerk, advocate:—“ By contract of marriage, entered
 “ into of these dates, between John Cathcart younger of Carleton,
 “ the memorialist’s father, with consent of Sir Hew Cathcart of
 “ Carleton, Baronet, the father of John, on the one part, and
 “ Katharine Dundas, daughter of Robert Dundas of Arniston,
 “ on the other part, Sir Hew, in contemplation of a marriage
 “ which was afterwards entered into between his son and Miss
 “ Dundas, became bound to infeft and seise the said John Cath-
 “ cart and the heirs-male to be procreated of the said marriage,
 “ whom failing, the other heirs and substitutes therein mentioned,
 “ in his lands and estate of Carleton and others. The interest
 “ of the persons called to the succession under this deed is pro-
 “ tected by most of the prohibitory, irritant, and resolute
 “ clauses usually inserted in entails at that period; and it was
 “ duly recorded in the register of tailzies during the lifetime of
 “ Sir Hew. By this deed power is reserved to Sir Hew to alter
 “ or innovate this present tailzie and order of succession above
 “ expressed, except in so far as concerns the said John Cathcart,
 “ and the heirs male or female of this present marriage, to whose
 “ prejudice he is hereby bound and obliged to make no altera-
 “ tion. Accordingly, in exercise of this reserved power, Sir Hew
 “ executed a procuratory of resignation, bearing reference to the
 “ contract of marriage, and which is declared to be granted under

Nov. 9, —

Aug. 17, 1772.

“ all the reservations, conditions, limitations, &c. expressed in
 “ that deed, by which he made certain alterations in the order
 “ of succession. This procuratory has not been recorded in the
 “ register of tailzies. It may be mentioned, historically, that the
 “ marriage between John Cathcart and Katherine Dundas was
 “ dissolved by the death of the latter in 1722, and that Sir Hew
 “ Cathcart died in 1723. Of this date, John Cathcart, then be- July 24, 1729.
 “ come Sir John, contracted a second marriage with Elizabeth
 “ Kennedy, eldest daughter of Sir John Kennedy of Cullean,
 “ of which marriage the memorialist is the heir-male, and is in
 “ right of the estate under the destination in the contract of mar-
 “ riage, and that in the procuratory of resignation. Sir John
 “ Cathcart, the institute, never made up titles to the estate, but
 “ possessed it in apparency from the death of his father in 1723
 “ till his own death in 1759. On that event he was succeeded May 9, 1759.
 “ by his eldest son John, who for some time made up no titles;
 “ and it is known to the memorialist that he was very anxious to
 “ avoid completing titles under the entail. He was advised,
 “ however, by eminent counsel, that it was hazardous to trust to
 “ the negative prescription, which had run against the entail,
 “ as a protection against a declarator of irritancy, whether he
 “ should continue to possess on his apparency, or should overlook
 “ the entail, and serve heir to his grandfather Sir Hew. He
 “ therefore expedite a general service, as heir-male of the body
 “ and heir of tailzie and provision of Sir John Cathcart his
 “ father, in terms of the contract of marriage, and the procura-
 “ tory of resignation executed by Sir Hew; and having obtained
 “ charters of resignation on that procuratory, he was duly infeft,
 “ under all the conditions, provisions, &c. expressed in the
 “ entail. Sir John, the second, died in the month of March
 “ 1783, and was succeeded by the memorialist, who, of this date, April 7, 1784.
 “ expedite a special service, as heir-male and of tailzie and pro-
 “ vision of his brother Sir John, in terms of the contract of mar-
 “ riage and the procuratory of resignation; and was infeft,
 “ under all the conditions, provisions, &c. expressed in these
 “ deeds. The memorialist is very anxious to alter the destination
 “ contained in the contract of marriage and procuratory of re-
 “ signation in some respects; but he understands that the pro-
 “ hibitory, irritant, and resolute clauses in the contract of
 “ marriage are sufficient to prevent him from accomplishing this

July 18, 1831. “ object, either by a new destination, or by a sale. He is
“ advised, however, that there is no effectual prohibition against
“ the contraction of debt, and that his object may be attained
“ in that way. The only clause which aims at a direct pro-
“ hibition against the contraction of debts in general is the fol-
“ lowing:—Providing also, that it shall not be lawful to, nor in
“ the power of the said John Cathcart, nor any of the heirs of
“ tailzie and provision above specified, to alter, innovate, or
“ change this present tailzie and order of succession, or to sell,
“ alienate, or dispone, neither irredeemably nor under reversion,
“ nor yet to wadset or burden with infestments of annual rent,
“ nor any other servitude of burden, the tailzied lands and estate
“ above written whatsoever, or any part thereof, except in the
“ cases and in the way and manner above provided; nor to set
“ tacks nor rentals of the samen for any longer space than nine-
“ teen years, or the setter's lifetime, and without diminution of
“ the rental, except in the cases of necessity, where a sufficient
“ tenant cannot be found to pay the whole rent; nor to do no
“ other fact or deed, civil or criminal, directly or indirectly, in
“ any sort, whereby the said tailzied lands and estate, or any part
“ thereof, may be affected, apprised, adjudged, forefaulted, or
“ any other way evicted from the said heirs of tailzie, and this
“ present tailzie and order of succession thereby prejudged, hurt,
“ or changed. The irritant and resolute clauses are in the
“ following terms:—Declaring always, that if the saids heirs-
“ female, and descendents of their bodies succeeding to the saids
“ lands and estate, shall failzie to assume, bear, and use, in all
“ time thereafter, the sirname, arms, title, and designation above
“ written, or that the said John Cathcart, or any of the heirs of
“ tailzie, shall contraveen, or fail to fulfil the conditions and pro-
“ visions of this present tailzie, or any one of them, any manner
“ of way, and specially, but prejudice of the generality foresaid,
“ by altering or changing the order of succession, or disposing,
“ selling, wadsetting, or burdening with infestments of annual
“ rent, or other servitudes or burdens, the saids lands, or any part
“ thereof, otherwise than as it is above provided, or by providing
“ their spouses in liferent provisions of the lands and others fore-
“ said, exceeding a third part of the free rent of the samen, or
“ by infesting and securing their spouses, male or female, in any
“ annual rents or annuities to be uplifted out of the said lands,

July 18, 1831.

“ but in the lands themselves, or by burdening the samen, for
“ provision of the daughters or other children, with more than
“ the sum of ten thousand merks, in manner above provided, or
“ by granting absolute or irredeemable dispositions for payment
“ of the said provisions or annual rents thereof, or by granting
“ infeftments of annual rent for the said provisions, or by not
“ inserting in every bond, security, or obligation which shall be
“ granted for the sums wherewith they are allowed to provide
“ their younger children the particular clauses and provisions
“ above appointed to be insert therein, or by granting tacks and
“ rentals otherwise than as above, or by contracting debts, except
“ in so far as they are empowered in manner above mentioned,
“ or by doing any other fact or deed, civil or criminal, whereby
“ the said lands may be burdened, evicted, forefaulted, or ad-
“ judged, or by possessing of the said lands by virtue of any other
“ title or right than this present tailzie, infeftments, and convey-
“ ances to follow hereupon, or by not inserting in their several
“ rights and conveyances the hail conditions and irritancies
“ hereof, or by lying out unentered, or by not paying the said
“ casualties of superiority, or other public burdens, whereby the
“ said estate may be anywise adjudged or evicted for the samen,
“ or by not purging of the saids adjudications, at least two years
“ before the legal expire; that then, and in these or in any of
“ these cases, not only all such facts and deeds committed,
• “ done, or contracted contrair hereunto, with all that may follow
“ thereon, shall be of themselves void and null and of no force,
“ sicklike as if the samen never had been done, contracted, or
“ committed, in so far as concerns the saids lands and estate above
“ expressed, which, nor no part thereof, shall be anyways affected
“ or burdened therewith, in prejudice of the saids heirs of tailzie
“ and provision above specified, appointed to succeed by virtue
“ of these presents, which are made and granted sub modo, and
“ under the provisions above specified, and no otherways; and
“ also the person or persons so contravening or failing to fulfil
“ the above-written conditions or irritancies, or any of them,
“ shall, for themselves, ipso facto, lose, amit, and forefault their
“ right and interest in the saids lands and estate, and the samen
“ shall become void and extinct, and it shall be lawful for the
“ next heir of tailzie, who would succeed if the contravener were
“ naturally dead, albeit descended of the contravener's body, to

July 18, 1831, “ purchase and obtain declarators upon the contravention, or
“ failing to fulfil any of the said provisions and conditions, or to
“ obtain themselves served and returned, infest and seised in the
“ said tailzied lands, in the same way as if the contravener were
“ naturally dead, in respect the right of the said contravener is
“ hereby declared to be void and extinct as said is, and the right
“ of succession of the foresaid lands and estate is hereby pro-
“ vided to devolve and pertain to the next heir of tailzie;
“ and the person so succeeding, and all the subsequent heirs of
“ tailzie, shall be liable to the same irritancies. It may no doubt
“ be inferred, with perfect certainty, both from the foregoing
“ clauses and from the general tenor of the deed, that it was the
“ intention of parties to prohibit the contraction of debt. The
“ memorialist, however, conceives that this has not been effec-
“ tually done, and he desires to have the advice of counsel on
“ this point, and also, if such shall be the opinion of counsel, to
“ be directed as to the steps necessary to be taken by him for
“ attaining, by means of the contraction of debt, the power of
“ regulating the succession to the estate. On the other hand,
“ in the event of the memorialist not adopting such measures as
“ may be recommended for defeating the entail, or not living to
“ complete them, he is desirous, so far as in his power, to make
“ such arrangements as are likely to deprive his successors of the
“ power of defeating the entail. It has already been mentioned,
“ that the procuratory of resignation, executed by his grand-
“ father Sir Hew Cathcart, has not been recorded in the register
“ of tailzies. On this procuratory all the subsequent titles to the
“ estate have been founded,—Sir John Cathcart, who first made
“ up titles under the entail, having resigned the estate in virtue
“ of this procuratory; and the memorialist has inserted the
“ series of heirs which it contains in his service, and subsequent
“ titles. The memorialist is apprehensive, therefore, that unless
“ it is recorded, some future heir may be enabled to sell the
“ estate. This he proposes to obviate by having the procuratory
“ of resignation recorded in the register of tailzies. And if it is
“ competent to him to impose new restrictions on his successors,
“ to the effect of prohibiting them from contracting debt, he pro-
“ poses to do so by executing a supplementary deed.

“ In these circumstances, the memorialist wishes to have the
“ opinion of counsel, in answer to the following queries:—First,

“ is it the opinion of counsel that the entail contains no proper July 18, 1831.
“ and effectual prohibition against the contraction of debt?
“ Second, if such shall be the opinion of counsel, what are the
“ steps which he ought to adopt for enabling him to accomplish,
“ as his ultimate object, the power of altering the order of suc-
“ cession to his estate? In considering this query, it is proper
“ counsel should be aware that the memorialist has a separate
“ estate of considerable value, both in land and money, entirely
“ at his own disposal; and that he has little or no debt, and does
“ not wish to borrow money to an extent, much less to an extent
“ approaching to the value of his entailed estate. Counsel is
“ therefore requested to say, whether a gratuitous bond, or other
“ obligation, will be sufficient to form a foundation for diligence
“ to affect the entailed estate? Third, is it advisable that the
“ memorialist should immediately apply to the Court of Session
“ for authority to record the procuratory of resignation in the
“ register of tailzies? Fourth, is it in the power of the memo-
“ rialist, at present, to remedy any defect in the entail by exe-
“ cuting a deed strictly prohibiting his successors from contracting
“ debt, and fortifying such prohibition with irritant and resolute
“ clauses?”

Mr. Clerk answered:—“ Query 1. The entail contains no
“ proper and effectual prohibition against the contraction of debt.
“ Query 2. I doubt whether a gratuitous bond, or other obli-
“ gation, can afford a sufficient means of affecting the entailed
“ estate, unless the obligation is absolute, and truly intended to
“ bind, and actually binding, upon the granter, because the
“ diligence intended to carry off the entailed estate, proceeding
“ upon an obligation merely in form, and not binding upon the
“ granter, would probably be considered as collusive, and of no
“ effect against the heirs of entail. Therefore I cannot advise
“ the memorialist to rely upon any such plan. A true debt must
“ be contracted, whether the obligation is onerous or gratuitous.
“ An onerous obligation will be most advisable in such a case;
“ because, though intended merely for the purpose of defeating
“ the entail, it would nevertheless be a real and true transaction,
“ just as a sale, where selling is not prohibited, though the entail
“ may be perfect in other respects, will defeat it, and the heir of
“ entail, after having sold the estate, may buy it back, and hold
“ it by a title in fee-simple. It occurs to me that the memo-

July 18, 1831. “ rialist may, without much difficulty, carry his purpose into
 “ effect. He must no doubt legally contract a debt, and I under-
 “ stand that it must be a very large debt, for it must be equal
 “ to, or larger than, the value of the estate. But I think that
 “ a debt, even to that extent, may be legally contracted without
 “ much trouble or inconvenience either to the memorialist or to
 “ the creditor. A true debt would be contracted by a common
 “ exchange of bills between the memorialist and a friend, upon
 “ which the latter would become creditor to the memorialist for
 “ the bill given to him in exchange, and would be entitled to
 “ adjudge for his security. The passages in the entail relative
 “ to adjudging do not and cannot apply to adjudications for
 “ debt, because the contraction of debt not being prohibited, the
 “ application of these passages is necessarily confined to other
 “ deeds or transactions, upon which adjudication would be com-
 “ petent. But even a direct prohibition against adjudication for
 “ debt would be altogether nugatory in such an entail, because
 “ the contraction of debt being allowed, all its consequences must
 “ necessarily follow. There may be other modes of contracting
 “ debt to a sufficient extent for defeating the entail ; and it sig-
 “ nifies nothing what the mode is, if a true debt to a sufficient
 “ extent shall be contracted. The next step to be taken after
 “ the adjudging is, with all expedition, to pursue a sale of the
 “ estate. I am not aware of any ground upon which that mea-
 “ sure can be opposed. When the estate comes to be sold, it
 “ should be purchased, either by the creditor, or by some other
 “ person, who will reconvey to the memorialist. Query 3. This
 “ is not of much consequence ; but I think it would be proper to
 “ record the procuratory of resignation in the register of tailzies.
 “ Query 4. I consider it to be quite established, that the pro-
 “ prietor of an estate, over which there is a subsisting entail, with
 “ strict clauses of any kind, has no power to make a new entail
 “ of the estate, without previously extinguishing the old entail.

“ Edinburgh, 19th March 1821. Referred to in my opinion,
 “ 13th July 1821.”

Thereafter Mr. Clerk gave the following additional opinion
 on the same memorial :—“ Upon reconsidering the plan of
 “ breaking the entail of Carleton, so as to enable Sir Andrew
 “ Cathcart to settle the estate by a new destination, it appears
 “ that the plan may be completed sufficiently to exclude the

“ present heirs of entail, and to establish a right in the heirs of July 18, 1821.
 “ the new destination, by the measures following, or measures of
 “ a similar nature. The debt may be contracted by exchange
 “ of bills, or other securities. It may be contracted even by
 “ gratuitous obligations ; but it seems more advisable to establish
 “ the debt upon onerous considerations. The debt being con-
 “ tracted, adjudication will follow in common form, and it should
 “ be completed by a charter and infeftment. A burden equal
 “ to or beyond the value of the estate being thus created, I
 “ apprehend that Sir Andrew, who had power to contract the
 “ debt, will be under no obligation to discharge in any question
 “ with the heirs of entail. Sir Andrew will have power to let the
 “ adjudication remain a burden upon the entailed estate till the
 “ legal expire, and a right of property is established in the cre-
 “ ditor, which of course may be made irredeemable. The
 “ burden being constituted, Sir Andrew may purchase it from
 “ the creditor, and hold it on his own account, taking an assig-
 “ nation, in place of paying the debt, and taking a discharge and
 “ renunciation. Sir Andrew will then possess the estate upon
 “ the adjudication as his title. It is easy to see, that the same
 “ money that will be paid by Sir Andrew for the adjudication
 “ will be employed by the adjudger in discharging the bill, or
 “ other security which he had given to Sir Andrew. That bill
 “ or security should, in the meantime, be passed by Sir Andrew
 “ to a third party. There seems to be no other management
 “ necessary in making these transactions, but for the purpose of
 “ preventing the debt contracted by Sir Andrew from being
 “ extinguished. When Sir Andrew obtains a sufficient right to
 “ the adjudication, it will be in his power to make a new entail
 “ of the lands, attending only to the nature of the title. It will
 “ probably be necessary to insert some clauses, providing for the
 “ imperfection of a title by adjudication.

“ Edinburgh, 13th July 1821.”

Thereupon Sir Andrew on the 25th of the ensuing September signed, as acceptor, a bill for 150,000*l.* payable ten days after date at the office of Messrs. Donaldson and Ramsay, W. S. Edinburgh, (the men of business of Sir Andrew,) in favour of Quintin Kennedy, a friend of Sir Andrew's, as the drawer, but to whom he was not at the time at all indebted. On the same day Quintin Kennedy accepted in favour of Sir Andrew a bill

July 18, 1831. also for 150,000*l.*, which Sir Andrew indorsed to Major Shaw, (a mutual friend of Sir Andrew and Kennedy,) in whose hands it was deposited and remained.

The bill drawn by Kennedy was protested for nonpayment, and the protest registered in the following October; and thereafter he raised a summons of adjudication for adjudging the whole entailed estates, on payment and security of this debt, and obtained decree of adjudication on the 15th January 1822, no appearance or opposition having been made by Sir Andrew. The decree having been extracted, Kennedy presented a signature of adjudication in Exchequer, and thereupon obtained a charter of adjudication, by which his Majesty, as Prince, disposed, in the usual words of style, "*dilecto nostro Quintin Kennedy de Drumellan, Armigero, ejusque hæredibus et assignatis hæreditarie, sed sub reversione secundum legem,*" the lands and barony of Carleton. The *quæquidem* of the charter correctly narrated the adjudication on which it proceeded. Kennedy was thereafter infeft, and his *sasine* recorded, and he thus completed a feudal title to the principality lands adjudged. The title to other lands, of which Sir Andrew was the superior, was also completed by letters of horning, at Kennedy's instance, against superiors, and the letters and execution were recorded. Sir Andrew Cathcart thereupon granted a charter of adjudication to Kennedy, "*and his heirs and assignees, heritably, but under reversion, in terms of law,*" of these lands. The *quæquidem* narrated the adjudication in the same terms as in the Crown charter of the Carleton lands. Kennedy was infeft on this charter, and the *sasine* recorded. The *sasines* were recorded on the 11th February. All this having been effected, Kennedy on the 13th of February conveyed the adjudication and the lands adjudged to Sir Andrew. The price is stated at 95,000*l.*, but no money actually was paid down by the party, and the deed was engrossed on a corresponding *ad valorem* stamp. Thereafter the bill for 150,000*l.* in the hands of Major Shaw was delivered to Kennedy and cancelled. The disposition proceeded upon the narrative of the bill and adjudication, and the various steps which had been taken to complete the title to the lands; and it is added, "*and seeing that the said Sir Andrew Cathcart has instantly made payment to me of the sum of 95,000*l.* sterling, as the price of the lands and*"

“ other heritages mentioned in the said decree of adjudication, July 18, 1831.
 “ and hereinafter described, with which I hold myself well satis-
 “ fied, and discharge him, his heirs and successors, of the same
 “ for ever.” The dispositive clause is as follows: “ Therefore,
 “ wit ye me, the said Quintin Kennedy, to have sold and
 “ disposed, as I do hereby sell, alienate, and dispoise from me,
 “ my heirs and successors, to and in favour of the said
 “ Sir Andrew Cathcart, and his heirs of line and assignees
 “ whomsoever, heritably and irredeemably, all and whole the
 “ lands and barony of Carleton,” &c. Then follows a descrip-
 tion of the lands, as contained in the decree of adjudication. In
 the procuratory of resignation Kennedy resigns the lands in
 favour “ and for new infeftment of the same, to be made, given,
 “ and granted to the said Sir Andrew Cathcart, and his heirs
 “ of line, and assignees, heritably, in due and competent form.

The assignation to the title-deeds contains a special right to the
 decree of adjudication, and there is a clause of warrandice from
 facts and deeds, and an obligation to infeft by double holding
 and precept, in the usual terms. Under these deeds Sir An-
 drew Cathcart completed his title by infeftment in November
 1822, and a charter of confirmation in July following. The
 expense of these proceedings was ultimately charged of and
 paid by Sir Andrew alone. He was in affluent circumstances
 when he accepted the bill in place of Kennedy, who made no
 claim for the difference between its amount and the sum stated
 as the price of the right to the adjudication.

No ostensible change took place in the possession of the
 estates; but Sir Andrew continued to enjoy them, under the
 original titles, until his death on the 13th April 1828. On this
 event a sealed paper was produced by his agent, containing a
 new deed of entail, dated January 29, 1827, by which Sir Andrew
 disposed the whole of the estates in the original entail, together
 with the fee-simple lands which he had himself acquired, to him-
 self and the heirs male of his body, whom failing the heirs female
 of his body, whom failing to John Cathcart of Genoch, a remote
 substitute under the original entail, and postponed John Andrew
 Cathcart, who, on Sir Andrew's death, had it not been for the
 above measures, would have taken the estates, under the original
 entail, to a distant part of the substitution. By this new entail
 Sir Andrew bound himself, and his heirs and successors whom-

July 18, 1831.

soever, to free and relieve the lands and other heritages thereby disposed, and the heirs named to succeed thereto, from the payment of all the debts and obligations to which he for himself, or representing any of his ancestors, was liable, and also from all claims by which the lands might be evicted from the parties to whom he destined them. The deed also provided, “ That in
 “ the event of my not having rendered my title, under which I
 “ now possess the lands and others specified and contained in
 “ the said decree of adjudication at the instance of the said
 “ Quintin Kennedy against me, irredeemable during my own
 “ life, by decree of declarator of expiry of the legal or other-
 “ wise, then and in that case the heirs-male of my body, and
 “ the other heirs of tailie, substitutes, and successors before
 “ mentioned, shall be obliged, immediately on their succession,
 “ if the time allowed by law for redeeming the said adjudication
 “ shall have expired, and if otherwise, so soon as the time
 “ allowed by law for redeeming the said adjudication shall
 “ expire, and at all events without any unnecessary delay, to
 “ institute a process of declarator of expiry of the legal of the
 “ said adjudication, and such other process or processes as shall
 “ be considered by the Dean of the Faculty of Advocates for
 “ the time to be the most proper for rendering irredeemable the
 “ right and title of the said lands and others, and to obtain a
 “ decree or decrees in such process or processes.”

John Cathcart of Genoch having made up titles under the new entail, Sir John Andrew Cathcart, the heir entitled under the original entail to succeed to Sir Andrew, and who had made up titles, accordingly raised an action of reduction, concluding for reduction of the 150,000*l.* acceptance, on which the adjudication had been led—the decree of adjudication—the horning against superiors—the charters of adjudication, &c., including each subsequent deed in the above-mentioned progress of suits, and the new deed of entail, except in relation to the lands which had belonged to Sir Andrew in fee-simple.

The Lord Ordinary (8th December 1829) found, “ That the
 “ deed of marriage contract and entail, of date the 6th and
 “ 25th July 1717, confirmed by the procuratory of resignation
 “ of date 17th August 1722, both narrated in the summons and
 “ condescendence, does not contain any general prohibition duly
 “ expressed in the prohibitory clause, whereby it is declared not

July 18, 1831

“ to be lawful to the heirs of tailzie to contract debts by which
 “ the estate may be adjudged or evicted, and that this defect in
 “ the prohibitory clause is not supplied by any implication from
 “ other parts of the deed: Finds, that if a true debt had been
 “ contracted by the late Sir Andrew Cathcart, and an adjudica-
 “ tion proceeding thereon had been bonâ fide completed by the
 “ creditor, the said Sir Andrew Cathcart might not have been
 “ barred from afterwards acquiring the title by adjudication, so
 “ constituted in the person of the creditor, or from keeping up
 “ that title in his own person, and disposing thereof, in respect
 “ that the defect of this entail is in the prohibitory clause, and
 “ that the heirs were not laid under any obligation not to con-
 “ tract debt; but finds, that upon the facts admitted in the
 “ record, or fully proved by the writings produced, it is estab-
 “ lished that there was no true or real debt contracted by the
 “ said Sir Andrew Cathcart, as between him and Mr. Quintin
 “ Kennedy, the alleged creditor in the sum mentioned, at whose
 “ instance the adjudication called for to be reduced proceeded,
 “ and that the bill for 150,000*l.* granted by the said Sir Andrew
 “ Cathcart in favour of the said Quintin Kennedy—the counter-
 “ bill for the like sum granted by the said Quintin Kennedy in
 “ favour of the said Sir Andrew Cathcart—the adjudication
 “ thereafter deduced by the said Quintin Kennedy—and the dis-
 “ position and assignation by him in favour of the said Sir An-
 “ drew Cathcart, and the titles completed thereon,—were all and
 “ each of them fictitious and collusive, being neither intended to
 “ constitute, nor in effect constituting, any real adjudication of
 “ the estate for a debt truly and bonâ fide contracted: Finds,
 “ that by the said entail the heirs of tailzie are effectually pro-
 “ hibited ‘to alter, innovate, or change this present tailzie and
 “ order of succession:’ Finds that the various writs and pro-
 “ ceedings called for in the summons being altogether fictitious
 “ and collusive, in so far as they appear to originate in debt con-
 “ tracted by the said Sir Andrew Cathcart, do in fact import an
 “ attempt directly to alter the order of succession to the said
 “ estate, in violation of the express prohibition of the entail,
 “ under colour of a feigned adjudication for debt: Finds, that
 “ the last plea in law stated for the defender, founded on the
 “ obligation laid by the said Sir Andrew Cathcart, on all his
 “ heirs and representatives to give effect to his new entail, and to

July 18, 1831. “relieve the estate of the adjudication, necessarily depends for its
 “validity on the previous plea in regard to the reality and legal
 “efficacy of the said title by adjudication to create a true and
 “valid burden on the estate, and that it would otherwise amount
 “to a plea that the deceased could impose a binding obligation
 “on the heirs of tailzie to give effect to a direct alteration of the
 “succession, in contravention of the entail : Therefore repels the
 “defences, and reduces, decerns, and declares, in terms of the
 “conclusions of the libel, but finds no expences due.”—“*Note.*
 “Where there is a defect in the prohibitory clause of an entail
 “in any of the three great points of prohibition, the entail may
 “be rendered unavailing to the substitute heirs; but the act not
 “prohibited must be truly and actually done. In the present
 “case, the Lord Ordinary is satisfied that it was not done.
 “The findings of the interlocutor are intended to exhaust the
 “pleas in law.”

The defender reclaimed against the findings of the interlocutor generally, and prayed the Court “to recal that interlocutor, to
 “repel the reasons of reduction, assoilzie the petitioner (de-
 “fender), and find him entitled to expenses.”

The pursuer, on the other hand, reclaimed against the interlocutor, in so far as it “finds that the deed of marriage contract
 “and entail, of date the 6th and 25th July 1717, confirmed by
 “the procuratory of resignation, of date 17th August 1722,
 “both narrated in the summons and condescendence, does not
 “contain any general prohibition duly expressed in the pro-
 “hibitory clause, whereby it is declared not to be lawful to the
 “heirs of tailzie to contract debts, by which the estate may be
 “adjudged or evicted, and that this defect in the prohibitory
 “clause is not supplied by any implication from other parts of
 “the deed;” and in so far as it “finds, that if a true debt had
 “been contracted by the late Sir Andrew Cathcart, and an
 “adjudication proceeding thereon had been bonâ fide completed
 “by the creditor, the said Sir Andrew Cathcart might not have
 “been barred from afterwards acquiring the title by adjudica-
 “tion, so constituted in the person of the creditor, or from
 “keeping up that title in his own person, and disposing thereof,
 “in respect that the defect of this entail is in the prohibitory
 “clause, and that the heirs were not laid under any obligation
 “not to contract debt.” And the pursuer prayed the Court

to find, in terms of the conclusions of the libel, that the said deeds did contain an effectual prohibition against the contraction of debt. But the Court, holding that it was unnecessary to enter on the question involved in the two first findings of the interlocutor of the Lord Ordinary, the other findings being quite sufficient for the decision of the question betwixt the parties, refused the desire of the defender's note, and adhered to the interlocutor of the Lord Ordinary complained of, under the qualification expressed in the interlocutor of the Court of the same date, upon advising the note given in for the pursuers: And further, the Lords repelled the first plea in law stated for the defender. The interlocutor by the Court, upon the reclaiming note for the pursuers, was—"In respect it is proved that there was no just or true debt contracted by Sir Andrew Cathcart to Mr. Kennedy, as found in the Lord Ordinary's interlocutor, and adhered to in the judgment of the Court of this date, upon advising the separate reclaiming note for the defender; find it unnecessary to take into consideration, or to decide the question involved in the two first findings of the interlocutor now complained of by Sir John Andrew Cathcart, and adhere to the Lord Ordinary's interlocutor, in so far as it finds no expences due to either party."

The defender appealed against the Lord Ordinary's interlocutor, except in so far as it finds that the marriage contract and procuratory of resignation do not contain any effectual prohibition against the contraction of debt by which the estate may be adjudged or evicted, and against the interlocutor of the Inner House.

Immediately on the death of Sir Andrew and the production of the new entail, an arrangement, about the full extent and meaning, however, of which, parties differed, was entered into, by the compulsory powers whereof a person was authorized to take charge of the estates for the benefit of all concerned; the defender endeavouring to intromit with the rents, on the ground that he was in possession, as a good title. The pursuer petitioned the Court to sequester the entailed estates, and appoint a factor to uplift the rents; and their Lordships (11th February 1829) sequestered the lands and estates, and appointed William Johnston judicial factor thereon. Against this inter-

July 18, 1831. locutor also the defender appealed ; but it is unnecessary to take notice of the arguments in support of the appeal, as the discussion at the bar of the House of Lords was confined to the questions in the reduction.

Appellant.—A deed conveying heritage is not effectual as an entail, unless it be framed in strict conformity to the act 1685, allowing entails under certain conditions ; and if not so framed, the party favoured and his heirs are entitled to enjoy, dispose of and burden the property at pleasure, as proprietors thereof in fee-simple. By the feudal law no vassal had a right to make an entail of his lands. The charter by his superior regulated the succession of the vassal, and he could not substitute any person in the place of those heirs whom the superior had selected to be in their order his vassals. But in the progress of society important changes took place. The first step was to allow the creditors of the vassal to attach his lands, as a satisfaction for the debts due to them ; and the superior was bound by statute to receive such creditors as his vassals, on payment of a fine or composition to compensate for this departure from the order of succession which had been laid down by him. After this vassals were allowed to alienate their lands on payment of a similar fine to the superior ; because, after adjudication for debt was permitted, the vassal, when he intended an entire alienation, could easily effect his purpose by receiving the price as a loan ; in virtue of which the purchaser could, in the character of creditor, adjudge the lands and compel the superior to receive him as his vassal. The last step in the progress was to allow the vassal to alter the order of succession prescribed in his charter, and this was a natural consequence of the preceding changes, or rather was comprehended under the general right of alienation. Thus vassals came at length to have vested in them the full right of property, the *jus utendi, fruendi, libereque disponendi*. But after vassals had thus become truly proprietors of their lands, they became desirous of limiting the rights of their successors. This led to what is properly called an entail, that is, the destination of an estate under certain restraints and provisions. These were not only negative, but positive ; but, as their main object was to prevent the estate from being carried away from the heirs called to the succession, they were chiefly

of a prohibitory nature, and hence the clause containing them July 18, 1891.
has usually been termed the prohibitory clause. Such restraints, however, were ineffectual at common law, because they are incompatible with the right of property. Various devices were employed in order to give that efficacy to entails which the common law denied them; and at last, after many unsuccessful expedients, it was conceived that the prohibitory clause in entails might be strengthened by irritant and resolute clauses, providing that, if the heir in possession should alienate or burden the estate with debt, or alter the order of succession, not only his deeds should be null and void, but he himself should forfeit his right to the estate in favour of the next heir of entail. The efficacy of such a deed was put to the test in 1662 in the case of Stormont. The entail was there sustained, but the decision passed with difficulty, the Court being nearly divided, nor has it ever been regarded as an authority of weight. In 1685, however, the legislature interfered; and if the statute had not given sanction to entails at common law, they could not have stood. They are the mere creatures of that statute. But to constitute a valid statutory entail, the deed must contain certain specific, prohibitory, irritant, and resolute clauses. It is not enough that an entail contain some prohibitions and conditions, guarded by irritancies and resolutions of right; but among these there must be provisions that it “shall not be lawful to the
“ heirs of tailzie to sell, annailzie, or dispone the said lands, or
“ any part thereof, or contract debt, or do any other deed
“ whereby the samen may be apprised, adjudged, or evicted
“ from the other substitutes in the tailzie, or the succession frus-
“ trate or interrupted.” An entail wanting any of these prohibitions imperatively enjoined and enumerated in the statute would not be an entail in terms of the statute, and cannot receive validity or support from the statute; at common law it has no sanction. The deed, therefore, while it carries the estate to the parties who are favoured by it, does not impose those restraints which the law acknowledges, and of necessity the estate descends as an unlimited fee, and the result is that the appellant’s author possessed in fee-simple.

Lord Chancellor.—If you are quitting your argument upon the point that a defect in one particular affects the deed in all others,

July 18, 1831. and makes the whole entail void, will you permit me to ask you whether you have any cases to quote for that position?

Dr. Lushington.—I do not know that I have any decisions to cite, my Lord.

Lord Chancellor.—I thought not ; it is a doctrine of 1831.

(2.) The procuratory of resignation in 1722 is the fundamental title of both parties ; * it however could only have effect

* The appellant's argument on the procuratory of resignation is founded on the following progress of titles. By the contract of marriage the destination of the estates was to and in favour of " John Cathcart, and the heirs-male to be procreate of " the marriage betwixt the said Mrs. Catherine Dundas and him ; which failing, his heirs- " male of any other lawful marriage ; which failing, to the heirs-male to be procreate " of the said Sir Hugh Cathcart his own body ; which failing, John Cathcart, eldest " son of the deceased Andrew Cathcart, brother-german of the said Sir Hugh, and " the heirs-male of his body ; which failing, Andrew Cathcart, his second son, and " the heirs-male of his body ; which failing, Hugh Cathcart, his third son, and the " heirs-male of his body ; which failing, the heirs-female to be procreate of the said " John Cathcart, (then younger of Carleton,) of this or any other marriage ; which " failing, the heirs-female to be procreate of the said Sir Hugh his own body ; which " failing, John Cathcart of Genoch, and the heirs-male of his body ; which failing, " the heirs-female of the said deceased Andrew Cathcart his body ;—all which failing, " the said Sir Hugh Cathcart, his nearest and lawful heirs whatsoever." The contract, however, specially provided and declared, that Sir Hugh Cathcart should have full power and liberty " to alter or innovate this present tailzie and order of succession " above exprest, except in so far as concerns the said John Cathcart, and the heirs- " male or female of this present marriage, to whose prejudice he is hereby bound and " obliged to make no alteration." The contract was recorded in the register of tailries. Sir Hugh Cathcart exercised the reserved power by executing, in 1722, a procuratory of resignation. This deed proceeds on the narrative of the destination in the contract of marriage, and the reserved power to alter and innovate the same, and his resolution " in some part to alter the order of succession contained in the said contract of mar- " riage and taillie, without hurt or prejudice to the said taillie as to any other points " not hereby expressly altered. He grants authority to resign the lands in favours " and for new infeftment of the samen, to be given and granted to the said John " Cathcart, my son, and the heirs-male to be procreat of his body ; which faillicieing, " to the heirs-male of the body of me the said Sir Hugh Cathcart ; which faillicieing, " to Margaret Cathcart, eldest daughter procreat betwixt the said John Cathcart, my " son, and the said deceast Mrs. Catherine Dundas, and the heirs-male of the said " Margaret Cathcart her body ; which faillicieing, to Ann Cathcart, second daughter " procreat betwixt the said John Cathcart and Mrs. Catherine Dundas, and the heirs- " male of her body ; which faillicieing, to Andrew Cathcart, second son of the deceast " Andrew Cathcart, merchant in Glasgow, my brother, and the heirs-male of his body ; " which faillicieing, to Hugh Cathcart, third son of the said Andrew Cathcart, my

as an entail if it was executed and completed in terms of law; but it was not. For although the act 1685, authorizing

July 18, 1831.

“ brother, and the heirs-male of the said Hugh's body; which faillieing, to the
 “ nearest heirs-female, without division, of the said John Cathcart, my son, his body;
 “ which faillieing, to the eldest heir-female to be procreat of the body of me the said
 “ Sir Hugh Cathcart; which faillieing, to John Cathcart of Genoch, and the heirs-
 “ male of his body; all which faillieing, to me the said Sir Hugh Cathcart my
 “ nearest and lawful heirs and assignees whatsoever.” The procuratory contains a
 warrant for recording it in the register of tailzies, but it was not recorded. It did
 not specify the limitations, conditions, and provisions enjoined by the marriage con-
 tract; it merely provided that the lands shall be holden “ with and under the
 “ powers, faculties, reservations, limitations, burdens, irritancies, and provisions in
 “ favour of or burdening the heirs of tailie named in the said contract, which I
 “ appoint to be held as expressly repeated in this present nomination as a part thereof,
 “ and to be insert in the charter and infeftments to follow hereupon, and to affect,
 “ restrict, limit, burden, and enable the heirs mentioned in this present nomination
 “ and procuratory, in the same way as they were to have affected, restricted, limited,
 “ burdened, and enabled the heirs of tailie contained in the substitution insert in
 “ the said contract of marriage.” Farther, it contained a new condition and irritancy
 which was not in the contract of marriage, namely, “ that in case, by failure of
 “ heirs-male of my said son's body, my said lands and estate shall devolve upon the
 “ said Margaret or Ann Cathcarts, my said son's daughters, and the heirs-male of
 “ their bodys, that the said heirs-male, as well as the other heirs-female, who may
 “ succeed by virtue of this nomination, be obliged to assume and use the name and
 “ arms of Cathcart, and title of Carleton, otherwise their right shall be irritat, and
 “ the estate devolve upon the next heir who would succeed, if they were naturally
 “ dead.” John Cathcart younger did not make up any title after his father's death,
 but possessed the estate, during his own life, merely as apparent heir of Sir Hugh
 Cathcart. After the death of his first wife, Catherine Dundas, he entered into a
 second marriage, by which he had several sons. He died in 1759, and was succeeded by
 his eldest son, also named John, who, in 1765, expedie a general service “ as nearest and
 “ lawful heir-male of the body of John Cathcart his father, and as such, nearest and
 “ lawful heir of tailzie and provision to him, in terms of a contract of marriage entered
 “ into between him, with consent of Sir Hugh Cathcart of Carleton, Bart., his
 “ father, on the one part, and Mrs. Catherine Dundas, daughter of Robert Dundas
 “ of Arniston, one of the Senators of the College of Justice, with consent of her
 “ father, on the other part, dated 6th and 25th July 1717; as also in terms of a
 “ procuratory of resignation granted by the said deceased Hugh Cathcart, in relation
 “ to said contract of marriage, dated 17th August 1722.” He then, in 1765,
 resigned the lands of Carleton, and others held of the Prince, on the above procu-
 ratory of resignation, and expedie a charter of resignation in favour of himself and the
 other heirs called to the succession by the said procuratory, and on this charter was
 infeft. Having acquired from the superiority of the lands of Waterhead and Killo-
 chan, he made up his title to the dominium utile of these lands by resigning in
 1768 upon the procuratory of resignation, and the retour of his service, for new in-
 feftment, in favour of himself and the other heirs of tailzie called to the succession in
 the order prescribed by that procuratory; and he thereafter, of the same date, granted
 a charter of resignation in favour of myself and the other heirs of tailzie called to the

July 18, 1831. tailzies, expressly declares, "that such tailzies shall only be
 " allowed in which the foresaid irritant and resolute clauses
 " are insert in the procuratories of resignation, charters, pre-
 " cepts, and instruments of seisin, &c." the procuratory of resig-
 nation 1722 does not contain any prohibition, or irritant or
 resolute clause, except that which relates to the name and arms
 of Cathcart of Carleton. The reference to the powers, faculties,
 reservations, limitations, burdens, irritancies, and provisions in
 favour of or burdening the heirs of tailzie named in the contract

succession by Sir Hugh's procuratory, upon which he was infeft. Under these titles
 he possessed the estates till his death in 1783. Having died without heirs of his body,
 he was succeeded in his estate by his immediate younger brother, Sir Andrew Cath-
 cart (the appellant's author), who was served heir in special, as heir male of tailzie
 and provision to his brother, in the lands and barony of Carleton, but with and under
 the " provisions, conditions, limitations, clauses irritant and resolute, contained in
 " the contract of marriage between the deceased Sir John Cathcart of Carleton, Bart.,
 " (father of the said Sir Andrew Cathcart, therein designed John Cathcart younger
 " of Carleton,) with consent of Sir Hugh Cathcart his father, on the one part, and
 " Mrs. Catherine Dundas, daughter of Robert Dundas of Arniston, one of the
 " Senators of the College of Justice, with consent of her said father, on the other
 " part, dated 6th and 15th July 1717, and in a procuratory of resignation granted
 " by the said Sir Hugh Cathcart relative to said contract, dated 17th August 1722."
 Upon the retour of his service, Sir Andrew obtained a precept from Chancery, and
 was infeft, and having made up titles to the Crown superiorities of the lands of
 Waterhead and Killochan, he granted a precept of clare constat in favour of himself,
 and the other heirs of tailzie called to the succession by Sir Hugh Cathcart's procu-
 ratory, upon which he was infeft. The respondent is descended from Hugh Cathcart,
 the youngest son of Andrew Cathcart, who was called to the succession by the procu-
 ratory of resignation on the failure of Margaret and Anne Cathcart, and the respective
 heirs-male of their bodies, and of Andrew Cathcart, second son of the respondent's
 ancestor Andrew Cathcart, and the heirs-male of his body. In 1828 he expedie a general
 service, which has been retoured to Chancery, as " *propinquior et legitimus hæres*
 " *talliæ et provisionis dict. quondam Domini Andreæ Cathcart de Carleton, nepotis*
 " *fratris ejus abavi, in terminis syngraphiæ talliæ executæ per dict. Hugonem Cath-*
 " *cart, quam content. in contractum maritagii fact. inter, &c.; ac etiam in terminis*
 " *procuratoriæ resignationis per dict. Dominum Hugonem Cathcart in favorem dict.*
 " *Domini Joannis Cathcart, ejus filii, aliorumque personarum postea mentionat. de*
 " *data decimo septimo die mensis Augusti anno millesimo septingentesimo et vige-*
 " *simo secundo, recordat. in libris Sessionis quarto die mensis Octobris anno mille-*
 " *simo septingentesimo sexagesimo octavo. Per quam syngrapham talliæ primam*
 " *mentionat. dict. Dominus Hugo Cathcart resignavit terras aliasque inibi mentionat,*
 " *&c. et per quam procuratoriam resignationis supra mentionat. dict. Dominus Hugo*
 " *Cathcart, virtute potestatum reservatarum illi per dict. syngrapham talliæ, in*
 " *tantum mutavit destinationem particulariter antea script. quam vocare tam hæredes*
 " *talliæ proxime post dict. Joannem Cathcart, filium ejus, hæredes masculos ex*
 " *corpore ejus dict. filii; quibus deficient. &c."*

of marriage, which are appointed to be held, as expressly repeated in the procuratory of resignation as a part thereof, is not due compliance with the absolute and unqualified statutory enactment of actual insertion. A Court which should sustain an entail defective in these respects would, in fact, usurp a legislative power. But even if a mere reference was sufficient, the procuratory, not having been recorded in the register of tailzies, could have no effect to prevent the proprietor, holding under such a title, from exercising every right which belongs to proprietors in fee-simple. July 18, 1831.

Lord Chancellor.—I take it that argument would be very good against singular successors, in reference to a sale made by a person in whose favour the succession had been altered; but how does it apply here? Your difficulty all along is, that the party seeking to take advantage of this is Sir Andrew Cathcart, the man who himself alters the order of succession. It is in respect to him that the question arises; can he unfetter himself by this contrivance? Your argument is, that there is a defect of registration; suppose it to be so, that applies only to third parties—how does it apply inter hæredes?

Dr. Lushington.—The distinction between heirs and strangers, in relation to entails, is not authorized by the act 1685, which, on the contrary, declares, that only on the due observance of the prescribed requisites, an entail shall be effectual against heirs, as well as creditors and singular successors. No doubt the Court of Session has sometimes made a distinction; but their decisions proceeded on the erroneous notion that, though an entail be not executed in terms of the statute, its provisions and conditions nevertheless create a jus crediti in favour of the substitutes, which the heir in possession cannot disappoint by any voluntary deed. This notion, however, has been exploded by the judgment in the Ascog case. There the Court of Session, holding that the substitutes had a jus crediti, decided in their favour. But this House reversed their decision; and thus, in substance, determined that the distinction between heirs and strangers was without foundation.

(3.) The marriage contract, and the subsequent procuratory of resignation, do not constitute an effectual entail in terms of the statute, inasmuch as they do not contain a prohibition against contracting debt, by which the estate may be appraised, adjudged, or evicted; and therefore Sir Andrew Cathcart enjoyed

July 18, 1831. the rights and powers of a proprietor in fee-simple, and could alienate the estate, alter the order of succession, or grant obligations, whether gratuitous or onerous, by which the estate might be apprised, evicted, or adjudged.

(4.) Even if the defect in the entail were not sufficient to invalidate the contract 1717 as an entail, yet, in consequence of that defect, Sir Andrew Cathcart, being entitled to contract debt, did exercise his right by contracting a just and true debt to Quintin Kennedy; and the said debt having been so contracted was a sufficient ground for the adjudication of the estate by Kennedy; and the adjudication, and the titles following thereon, having ultimately vested the same in Sir Andrew Cathcart, he had a right to execute the entail now brought under reduction. The question then arises, whether, at the date of the adjudication, a debt was truly owing by Sir Andrew Cathcart to Mr. Kennedy? Now, when Kennedy accepted and delivered a bill to Sir Andrew for a sum equal to that in the bill by Sir Andrew to him, he gave full value for the latter, and by consequence he was a legal creditor of Sir Andrew for its amount. The circumstance that there was an exchange of bills did not detract from the *jus crediti* vested in each of the parties by the transaction. In what are termed cross-bills the bills do not mutually extinguish each other, but each bill constitutes a debt due by the acceptor to the opposite party. Each may indeed be the subject of compensation or set-off in certain cases, but each subsists as a distinct debt till compensation or set-off be judicially pleaded and sustained. Assuming, then, that a just and true debt was constituted by Sir Andrew's acceptance, Kennedy, as the drawer and holder of the bill, was entitled to attach the real and personal estate of his debtor by the ordinary forms of diligence; and, in particular, as the entail of Carleton was defective, because it did not contain an effectual prohibition against contracting debt, Mr. Kennedy was entitled to adjudge that estate. This was accordingly done by him, and he completed an unexceptionable feudal title to the lands which he had adjudged.

The appellants are not bound to inquire into the ultimate object of Sir Andrew Cathcart; his immediate intention was to constitute a just and true debt. He did so, and that is enough. Restraints in entails are infringements on the right of property;

July 18, 1831.

and every heir is justified in freeing himself, if he can legitimately, from these restraints, and placing himself in the situation and with all the rights of a proprietor in fee-simple. If there be no prohibition against selling, it cannot be doubted that the heir may make a valid sale, either for a price instantly paid, or, which is not unusual in sales, secured by an heritable bond over the property sold, granted by the buyer. It is equally clear that, after such sale has been completed, the heir may repurchase exactly at the same price,—discharging, where it had not been actually paid, the security granted for it. He will then be the proprietor in fee-simple; and it will not affect the validity of the transaction that the purpose of the heir from the beginning was to repurchase, and afterwards settle the estate on persons more favoured by him than those who had been appointed to succeed by the entail. So, if there be no prohibition to alter the order of succession, the heir may alter it, and immediately afterwards sell the estate, or burden it with debt. It is absurd to say that such acts are frauds against the entail, for there can be no fraud in recovering the unqualified use and disposal of property by such means as an entailer has left open to the heirs of entail. When an heir professes to do one thing, and in reality does something different, that may perhaps be termed a fraud; at least, the act done must be judged of as it is, and not as what it pretends to be. When an heir, prohibited to alienate, but permitted to feu, gives away the whole estate by deeds professing to be feu-rights, these are alienations, and so are affected by the prohibition in the entail; but if a man is not prohibited to sell or to contract debt, the sale or contraction of debt is actually what it professes to be, and therefore is effectual, although the heir may have an ulterior object in view after he has made the sale or contracted the debt. In the Ascog case nothing could be plainer than the intention of the heir in possession to defeat the intentions of the entailer; yet the heir was successful in defeating these intentions, and that although the question was not with creditors, but inter hæredes, thus showing that the distinction between questions with creditor and heirs is altogether unfounded.

Lord Chancellor.—I think the Ascog case would go thus far. Suppose, there being no effectual prohibitory clause, Sir Andrew had contracted debt with a bonâ fide lender by a bonâ fide security,

July 18, 1831. to the amount of 100,000*l.*, that bonâ fide lender of the money would have had a right to lead an adjudication, and to bring the estate to a judicial sale, and Sir Andrew, according to the Ascog case, would not have been compellable to reinvest the money in the purchase of other estates. But suppose, instead of a bonâ fide creditor, the transaction is with this Quintin Kennedy, which is another name for Sir Andrew himself, what is the effect of the act so done? The thing is all moonshine. That is the view a lawyer will be apt to take of the question, and that will keep it quite wide of the Ascog case. My view of this case is, that there is no debt contracted, but merely the semblance of a contract, of the most collusive description, for the purpose of doing that which is prohibited—namely, altering the order of succession.

Respondents.—(1.) The doctrine that a contract or deed conveying heritage, and importing to be an entail, is ineffectual, unless it be framed in strict conformity to all the provisions of the Act 1685, and if not so framed, the party favoured by such deed is entitled to enjoy, dispose of, and burden the property at pleasure, as proprietor thereof in fee-simple, has no foundation on the statute, and is totally unknown in the law and practice of the law of Scotland.* It was only in a question with creditors that doubts were entertained of the validity of entails at common law, but it never was disputed that among heirs the deed was valid and effectual. The statute itself, which authorizes entails, “with such provisions and conditions as they (His Majesty’s subjects) shall think fit,” puts an end to the question; accordingly, our books are full of authorities, cases, and decisions which could not have occurred had the appellant a shadow of support for his reading. The whole argument is an ingenious trifling with the settled law of Scotland. The case of Ascog neither supports the doctrine that an entail defective in one point is inoperative in all, or that the distinction between questions with creditors and with heirs inter se has been departed from; on the contrary, the successful party in that case maintained that the Ascog entail was complete in itself, and that there was no

* The respondents alleged that the appellants had not, although it was their first plea in law, ventured to open it to the Court below; but had, on adjusting the terms of the interlocutor of the Court, moved the Court to add to their judgment, “and further, the Lords repel the first plea in law stated for the defender,” in order that it might be competent to discuss the point in the House of Lords.

ground for assuming that the maker meant it to be otherwise than it was; and the sale was held good and the claim of damages refused, not because the distinction between claims of creditors and heirs inter se was held untenable, but because the heir had done what was permitted. If so, he did that which no other heir could complain of. Here the heir has not done that which he was permitted, or rather not forbid, to do—contracting debt; but he did what was prohibited and restrained by resolute and irritant clauses—altering the succession. In saying so, we have assumed, but without conceding, that there is in the present entail no effectual prohibition against selling. July 18, 1831.

Lord Chancellor.—It is quite unnecessary to enter into argument on that point. The Court below have withdrawn from it. I incline, on the whole, to think that there is no effectual prohibition to contract debt.

(2.) The argument maintained on the procuratory of resignation is unfounded. The reserved power to alter could not affect John Cathcart, and the heirs male or female of his marriage; as far as related to them, the fetters were articulate and directly imposed, and the tailzie itself was registered. The titles were made up on both deeds, because Sir Andrew and the respondent were heirs, both under the marriage contract and the procuratory of resignation; but so far as regarded the heir of the marriage, the contract alone would have been sufficient for the completion of the title. It would have been in vain for any third party to contend that Sir Andrew's titles were completed under an unrecorded entail, simply because the charter had been expedited, not only on the recorded marriage contract, but on the unrecorded procuratory. So far as regards the heirs of the marriage, that procuratory was of no consequence. Beyond all doubt the respondent is entitled to ascribe the investiture under which his predecessors possessed, and he now claims, to that deed, which in the first place formed de facto the foundation of the titles to the estates, and which, secondly, as being recorded, was the deed under which the heirs of the marriage were peculiarly bound to possess. The question might have stood in a different situation with any party in whose favour the succession opened after the line of destination in the procuratory came to diverge from that

July 18, 1881. in the contract, and who, being exclusively heir under the procuratory, could not refer his title to the marriage contract as a recorded deed of entail, or maintain that the investiture, so far as he was concerned, depended upon the marriage contract. In that case the point might have been stirred as to the effect inter hæredes of an unrecorded entail. But there can be no such question here, because the destination in the marriage contract, as distinct from that in the procuratory, still subsists, and is the ruling destination. This would have been plain enough in a question with strangers, but it seems indisputable with parties who are equally and in the same position heirs under the marriage contract. How can one of these heirs thus taking under the marriage contract, or any person in his right, maintain that the entail has not been validly recorded, notwithstanding that the marriage contract was recorded merely because the procuratory of resignation was not registered—a deed granted not on alteration, but in aid of the marriage contract, and which never was intended to affect the heirs of the marriage. The marriage contract is the investiture of the heirs of the marriage, and the rights of these heirs are independent of the recording or non-recording of the procuratory. As to the procuratory merely referring to the prohibitions in the contract, that can be of no consequence, until it be shown that the party raising the point is heir under the procuratory, and not under the contract.

(3.) The respondents are advised that there is a valid restraint in the entail against contracting debt, but it is unnecessary to go into that point.

(4.) In fact there was no sale here, only a simulate, colourable, and collusive contrivance to effect a change in the order of succession. No real debt ever was contracted by Sir Andrew to Kennedy, and none was ever meant to be contracted. They never for a single instant stood in the relation of debtor and creditor to each other. It is indisputable entail law that an heir in possession, even where an entail is defective in regard to any of the prohibitions, can be defeated merely by doing that precise thing which is not effectually prohibited. It is not enough that he does what in its ultimate effect may be equivalent to what he is not prohibited from doing; he cannot simulate do

what is expressly prohibited, under the pretence or colour of doing what is permitted or not prohibited. This doctrine forms the basis of the decision as to the Roxburgh feus. July 18, 1831.

Lord Chancellor.—In that case there was a power to feu, and the heir in possession feued all except the mansion house and forty-seven acres. If he had feued but half the estate, there would have been a great deal of difficulty in setting the deed aside.

Lord Advocate.—The judgment proceeded on the ground that it was impossible to disguise the fact, that the whole was a colourable and simulate decree to reach an alteration of the succession by affecting to do what was permitted in relation to a mere act of feuing; but this the law would not permit.

Lord Chancellor.—The way in which the Roxburgh case applies is this :—Here is a permission to contract debts ; we will go the length of saying, here is an express power to contract debts ; but there is a prohibition, by a valid and effectual clause, to alter the order of succession. Then there is a collusive proceeding, which is nothing like contracting debt, but, under the pretended execution of the power to contract debts, something is done to alter the order of succession. In the Roxburgh case there were all the usual clauses of prohibition to contract debt, to alter the order of succession, and to sell, alienate, and dispone, and those were duly fenced by irritant and resolute clauses. But there was a power to grant feus and tacks ; and the heir of entail, pretending to grant feus and tacks, had feued out 16 lots of the estate, constituting, in fact, the whole estate, except 47 acres and the capital mansion. Then it was asked there, as I ask here, shall that be said to be such a granting of feus as brings it within the powers of the entail? for if it is not such a granting of feus as you are entitled under the entail to make, you come under the strict clauses, irritant and resolute, which fence the prohibition to sell, alienate, and dispone, and though you may call this a feu, we call it an alienation : that was the argument. Now, here the one party calls this contracting a debt ; on the other side, it is called an alteration of the order of succession. One calls it a contracting of debt, which he is not precluded from doing ; the other calls it an alteration of the succession, which he is precluded from doing. The analogy of the case is the Roxburgh prohibition to sell, excepting out of it the power of feuing. The power of feuing stands in the same relation there with the liberty to contract debt here ; and you cannot put this stronger. You cannot, I think, maintain

July 18, 1891. that it is so strong. If the author of this deed had said, "I hereby authorize my heirs of entail, one after another, to contract debt," that would make it precisely the same as the Roxburgh feus; but the question is, whether, under the pretence of doing that, you may do what you are prohibited from doing, namely, alter the order of succession? In the Roxburgh case it was stated, that they could not, under the power to feu, do that which they were prohibited from doing, namely, sell. The question here is, whether, under pretence of contracting debt, you can alter the order of succession?

My Lords, in this case, which has been very fully argued at your Lordship's bar, one or two points have been made on the part of the appellant, I might almost say for the first time. The great value of the property, which appears from the amount of the bills given in these simulated transactions, also confers importance on the case, but it is chiefly in regard to those points that I am to trouble your Lordships with a few words; for I hold it the bounden duty of your Lordships in all cases to take most special care, that, if desperate points should be mooted as tenable, no countenance shall be given to them, as if they were only doubtful, especially where important principles being drawn into groundless and unreasonable doubt, may tend to multiply litigation, and to shake the titles of property. Your Lordships will at once perceive I allude more especially to that which has been brought forward, for the first time to my knowledge, as even a matter of juridical exercitation—namely, that if an entail shall be aptly conceived in all but one respect, but with an inept clause, either of prohibition to sell, or of prohibition to contract debt, or prohibition to alter the order of succession, all the other parts of that instrument, be they ever so technically framed—be the fetters ever so accurately and effectually imposed by the deed—not only the defective portion of the entail, but the whole becomes a nullity. My Lords, I asked the learned counsel whether he had any cases to cite on that point. He candidly said he had not. I might have asked if there were any authority from text writers, or an obiter dictum of any one among the many Judges who have sat in the Court of Session when it was most numerous composed, and when (I speak it with all respect to that Court) obiter dicta of an ill-considered description were far more frequent than they have of late years been; or whether, among the records of that Court, in any period of its history, there can be found any colour or countenance whatever for a doctrine so strange and pregnant with peril. I should have asked in vain; I have also searched the books myself. The result is, that I can find nothing to give any countenance or colour for the doctrine; and that I may now, especially after the candid admission of the learned counsel who opened the point, state

July 18, 1831.

to your Lordships that there are no cases nor any authorities for that most fanciful construction of the act of 1685, and I feel at the present moment as much difficulty as I did at the beginning to conceive how it was possible that such a doctrine should receive any sanction even from arguments at the bar. My Lords, it is unnecessary for me to enter into the vexata questio, whether, previous to the statute, an entail was good as against singular successors. The Stormont case set up an entail as against singular successors, and that case was followed by others during the interval of about three-and-twenty years which elapsed previous to the date of the Entail Act. The authority of the decision, and the practice of conveyancers, seem to have established a common law of entail in Scotland, good against singular successors. Neither will I enter into that cognate and equally vexata questio, of how far the act of 1685 is declaratory and how far enactive; or, being enactive, (as I think it cannot, in one direction or the other, be doubted that it is,) whether we are to regard it as a restraining or an enabling act. The inclination of my opinion (but I speak with the greatest deference, and I should speak with much greater doubt and hesitation, were it not for the most respected authority of such a lawyer and conveyancer as my Lord Braxfield,) is, that the statute was rather to be regarded as enabling persons to entail, with a certainty of making their entails effectual against purchasers for valuable consideration, provided certain statutory requisites, as the price of obtaining this benefit of the statute, were complied with;—in other words, that the act means to settle the question of right to entail, but to restrain the right, so far as to lay down the conditions upon which men might use it. This becomes now matter rather of curious inquiry than of any practical consequence to the entail law, as whatever may have been the state of the law prior to the statute, and whether it be taken in the one sense or the other, it is clear, at all events, that since this statute entails must, in order to be good against singular successors, comply with the statutory provisions. But, my Lords, I take it, that the whole current of the decisions negatives the other propositions which have been contended for, not only the parent proposition I have glanced at, but the doctrine springing out of it—that if void against creditors, and other singular successors, the entail is also, and therefore, and to the same degree, invalid as amongst the heirs of entail, and intra familiam, as on behalf of one substitute against another; for in the Ascog case, undoubtedly, the Court construed an invalid prohibition to sell as an understood or implied permission to sell; and though, in that case, the House felt, during the whole of the argument and judgment, the impossibility of enforcing what was demanded to be so great, that

July 18, 1891. they inferred from thence the insufficiency of the arguments leading to it, namely, to that of reinvesting the price toties quoties and settling it to persons who had, the very day of the decision, the same right to sell; yet, in dealing with the other branch of the alternative conclusion of that summons,—namely, the right to damages against the contravener,—your Lordships deemed that to be absurd, as being inconsistent with the admitted doctrine that there was no valid prohibition to sell—consequently, that a man was not to be answerable in damages for doing that which he was not prohibited from doing. The ground on which the Ascog case was ultimately determined does not break in upon that which I have taken the liberty of stating, that the course and current of authorities is destructive of the proposition, that if an entail is bad as against singular successors, it is bad intra familiam. It becomes unnecessary to moot that point in this case in respect of the entail with which we are now dealing, for it differs entirely from the Ascog case, and differs entirely in some respects from any other I have had any opportunity of considering, either judicially or otherwise; and there is, in my humble judgment, no doubt whatever of the perfect accuracy of the decision the Court below has come to. My Lords, before leaving altogether the wholly untenable propositions to which I have referred, I will only remind your Lordships of the way in which the matter has been treated by great authorities, particularly Lord Kilkerran, as your Lordships will find in the case of Gardner, where his Lordship clearly shows that he never dreamt of such a doctrine as either of the two propositions I have adverted to; I mean, either that an entail, void for want of one clause, is void altogether, provided the fining clauses are complete; or that a clause, void against creditors and other singular successors, is therefore liable safely to be contravened by all those taking under the entail. “There is not a point in which our law-books,” says Lord Kilkerran, “more uniformly agree than this, that a simple prohibition has no other effect than to bar gratuitous deeds or debts from affecting the estate, but that onerous deeds and debts are no otherwise barred than by clauses irritant of the debt, and resolute of the granter’s right;” and he adds, “as there is nothing inconsistent that the contravener should perfect his rights, and yet his debts be declared to affect the next heir, which is the point at present in dispute, there could be no reason why the tailzie should not be taken as the granter had made it, and which is also agreeable to the statute, whereby every man is allowed to tailzie his estate under what conditions he thinks fit, provided only these conditions be consistent with the principles of law.” If your Lordships will look into the statute, upon which alone the argument I have

been adverting to has been here raised, you will find, in the first . July 18, 1831.
 place, that it expressly begins with stating, that it shall be lawful to
 the liege subjects of the king to tailzie their lands, and affect them
 with clauses, and so forth, according, or "as they shall think fit,"
 clearly showing, if any such words were wanting to show, or any
 arguments to prove, that the entailers were not tied down by
 any particular enumeration of clauses which follow. But next
 —be it declaratory or enactive—be it enabling or restraining—
 I entirely accede to the view taken on the part of the respondent,
 that the sound construction of the act is that which makes it give
 the measure of the entailing power, and indicates the point to which
 men may go in fettering their property, saying, "Up to this point
 "you may affect your entails by irritant and resolute clauses,
 "whereby you may prevent alienation and contracting debt, or doing
 "any other act whereby the order of succession may be altered.
 "Up to this point the King's subjects may affect their lands with
 "the fetters of an entail, but they shall be confined to this ex-
 "tent." They are not bound to go the whole of that length whether
 they desire it or not; because it is a groundless construction to say
 that what follows, namely, that you must insert in the register of
 tailzies, as well as in the progress of the title, the aforesaid fetters,
 or it shall be void at once as inter hæredes, means that you must
 insert all the kinds of prohibitions. It can only mean, what indeed
 it says,—that whatever prohibition you put in—whatever you elect
 to insert in your entail, you must insert in the records, otherwise
 your prohibitions shall not be effectual against singular successors,
 in order that the creditor may have notice, in order that the lender
 of the money may have notice, in order that the purchaser may
 have notice; consequently the act requires a notification to affect
 singular successors, and no procuratory of resignation, or other in-
 strument, shall be valid to affect singular successors, unless the whole
 of those clauses, with such prohibitions as you choose to make, fenced
 with the irritant clauses, shall, one after another, be fully inserted in
 the new register of tailzies, as well as in the old register, so as to
 have the effect of giving notice; that is the only sound construc-
 tion of the statute. My Lords, I am not here called upon to enter
 into the argument which might raise some doubt how far a man can
 very effectually entail his estate, without inserting all the three kinds
 of prohibition. I am not called upon to deal with that, as I shall
 presently show. I doubt, indeed, whether a man can effectually, in
 point of fact, prohibit any one of those acts being done without pro-
 hibiting all; because so many loopholes are left for doing that indi-
 rectly which he has prohibited doing directly, that I doubt whether,
 without the insertion of every one of the three prohibitions, there can,

July 18, 1891. de facto, be constituted an effectual fetter on the dealing with property. A single remark will illustrate this:—Suppose I entail my estate to prevent selling, and fence that with the proper clauses;—suppose I entail it also to the effect of not contracting debts, and fence it also with the clauses—if I say nothing about altering the order of succession, it is difficult to see how I can effectually prevent its being sold, or being carried away from the heirs,—to give to whom alone was the subject of the instrument,—without also prohibiting the altering the order of succession. In like manner, which brings us to the present case, I do not exactly see how a person can effectually prevent the order of succession being altered if he does not effectually prevent contracting debt, because, if I leave that wide, and only prohibit sale and disposition, and altering the order of succession, a person may covertly, and by ingenious devices—as the law says, “by subtle shifts and devices,”—so contract debt, (that is, bonâ fide contract debt,) that the estate by adjudication shall be carried away, provided that is done so as not to be a direct altering of the course of succession, or a selling and disposing. Therefore I do not think it is very far from the truth to maintain, that a person cannot, in point of fact, effectually entail his land, as the Scotch law stands, unless he inserts all the prohibitions in the deed. But, my Lords, with this question we are not called upon to deal; for admitting, on the one hand, that this entail does not effectually prohibit the contracting of debt, it is admitted equally on the other hand that it effectually prohibits sale, and that it effectually prohibits the altering the course of succession; and while the entail contains those clauses there can be no sale, no alteration of the order of succession, but in consequence of the contracting debt. What then has a man a right to do under it? He has a right to contract debt; and if he contracts debt, though it may lead indirectly and mediately to alter the course of succession, which is the subject of effectual prohibition, yet it has that effect only, because the entailer did not stop up that hole—because he allowed his heir of entail to contract debt, and by not preventing that he opened a door for the frustration of his main object. That I admit to be a very feasible process; but then, my Lords, it can only be accomplished by doing what the party has a right to do,—it can be only by doing that which the ineffectual prohibition left open to him, namely, contracting debt,—that the course of succession can be altered. He must really and not simulately contract debt, in order to enable him to accomplish that object, of altering the order of succession. The question then in this case is, has he or not really contracted debt? My Lords, it will not do to call it a contracting of debt, merely because it was clothed in the outward forms of that opera-

tion. When your Lordships find a person setting up a mere man of straw to give a bill for 150,000*l.* while he himself gives a counter security in another bill to the same amount—when you see that the custody of the instrument is the very reverse of that which it must be if the transaction were real—when you observe that the agent for the heir of entail and the pretended borrower is the person employed in conducting the whole of this operation, and not only the first part of this operation, but the last, namely, the adjudication which grew out of it, and was granted upon it, and the assignment of the same,—when Quintin Kennedy enters in the first act of the farce, gives his bill, and then retires, and never appears again throughout, but the whole of the scene is filled up and the whole of the parts sustained by and at the expence, not of Quintin Kennedy, but of the pretended borrower, and of him alone,—can your Lordships entertain the shadow of a doubt, that, even if Sir Andrew had proceeded to the final close of the drama, and had had a judicial sale gone through, it would have been still all his act; although he, being wary or sparing of his money, as well as abundant in his artifices, did not choose to go to the expence of the sale, though his counsel, Mr. Clerk, advised him to do it? In such circumstances as these, can your Lordships entertain a doubt that this is nothing like contracting debt—that it is only an attempt to give to the operation, which he was tied up from performing, the colour and appearance of the operation which he was allowed to perform, without any thing of substance—without any thing like contracting debt—without any debt—without any thing like debt;—and all for the express purpose, which the course of the proceedings clearly points out to have presided over the whole intention of the party contriving it—that of obtaining an adjudication nominally to Quintin Kennedy, but in reality to himself, the contravening heir of entail? Can your Lordships doubt that such was the purpose and intention of this party, and that, under colour of doing that which he was entitled to do, if there was no effectual prohibition, namely, contracting debt, he was attempting to do that which he was effectually prohibited from doing, namely, altering the order of succession? Such, my Lords, is the view which I take of this case—the view which was taken in the Court below. I have not the shadow of a doubt in my mind that the decision of the Court below is perfectly right, and that it ought to be affirmed; but I shall not, in this case, move your Lordships to give any costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

July 18, 1831.

Lord Chancellor.—My Lords, the case of sequestration stands in some respects on the same grounds as the one just decided. I have read the papers in the sequestration, and have considered the case. It has not been argued on either side, for it was unnecessary. When I look at the bargain made—when I look at the arrangement on which the one party appears to have acted—and when I look at the resiling, to use the language of the Scotch law, of the other party, in breaking the compact about interim possession, without any change of circumstances,—I am disposed to think, that in this case the conduct of the present appellant is not so free from blame as it may have been in the mooting, and even bringing up by appeal before your Lordships, the main question. My Lords, the fate of the sequestration case, as regards the merits, is not merely decided by the decision your Lordships have come to upon the action of reduction, but it is decided by the course of events, namely, by the possession about to be given to the party shown rightfully entitled. The only question remaining is, with respect to costs; and I own I can see no cause for bringing this appeal, whether the appellant was right or wrong in the case of the reduction. I do not think he is the more justified in bringing this appeal here if he was right than if he was wrong, for, in the very nature of the thing, the whole must needs have been at an end before this appeal could be discussed before your Lordships. If even we had taken up the sequestration first, and reversed the decision upon that, there could have been only a few days possession on which the decision could have attached. Under those circumstances I think a more groundless and ill-advised proceeding I have not often witnessed than bringing this appeal; and I have no hesitation, therefore, in proposing to your Lordships to affirm the judgment of the Court below with costs; I shall submit 150*l.*; and I would take the opportunity of giving this intimation, that if more appeals like this are brought, I shall feel it my duty to move your Lordships to give, in such cases, 300*l.* costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed, with 150*l.* costs.

Appellant's Authorities.—2 Stair, 3, 58; Hope's Minor Practicks, tit. 16; Drummond, 15th July 1636 (Mor. 4302); Bryson, 22d January 1760 (Mor. 15,511); Lord Ankerville, 8th August 1787 (Mor. 7010); Lockhart, 11th June 1811 (Fac. Coll. xvi. 279, No. 81); Hamilton, 3d March 1815 (Fac. Coll. xviii. 302, No. 69); 3 Dow's Reports, p. 183; Craik, 29th January 1735 (Mor. 4313); Lord Strathnaver, 2d February 1728 (Mor. 15,373); Ure, 17th July 1756 (Mor. 4315); Willison, 8th December 1724; Campbell's Heirs, 17th June 1746 (Mor. 6554); Stewart, 8th July 1789 (Mor. 15,535);

Billers, 1st May 1789; Craigie and Stewart's Reports, p. 255; Nairne, 13th July 18, 1831.
May 1796 (Mor. 2597); Gordon, 1st December 1757 (Mor. 11,161); and
Ker, 15th February 1758 (Mor. 15,551).

Respondents' Authorities.—Dunbar, 14th November 1815, not reported; Roxburgh
Feus, November and December 1813; 2 Dow's Reports, p. 149, 229; Ronaldson,
27th February 1799; Innes, 23d June 1807 (Fac. Coll. xii. 643, No. 285,
Ap. 1. Tailzie, No. 19); Hope's Minor Practicks, tit. 16; M'Kenzie
on Tailzies, II. 488; 3 Stair, 3, 59; 3 Ersk. 8, 28; 2 Bank. 3, 139; Kames'
Elucidations, p. 356; Earl of Callender, 20th July 1687 (Mor. Dec. 16,476);
Wallace, 8th February 1693; Fountainhall, I. p. 556. Young, 8th December
1705 (Mor. Dec. 15,487); and 25th January 1705 (Mor. Dec. 4319); Craig,
29th January 1735 (Mor. Dec. 4313); Ure, 17th July 1750 (Mor. Dec. 4315);
Lady Reidheugh, 11th March 1707 (Mor. Dec. 15,489); Craig's Creditors, 15th
June 1712 (Mor. Dec. 15,494), reversed on appeal; Robertson's Cases, p. 110;
Richard, 5th April 1734; 1 Craigie and Stewart's Appeal Cases, p. 143,
Gardner, 27th January 1744 (Mor. Dec. 15,501); Campbell, 17th June
1746 (Mor. Dec. 15,505); Hepburn's Creditors, 8th February 1758 (Mor.
Dec. 15,507); Sinclair, 8th November 1749 (Mor. Dec. 15,382); Lockhart,
27th January 1761 (Mor. Dec. 12,345); Kempt, 28th January 1779 (Mor.
Dec. 15,528); Bruce, 15th January 1779 (Mor. Dec. 15,539); Cunning-
ham, 5th August 1778 (Mor. Dec. 15,526); Stewart, 8th July 1789 (Mor.
Dec. 15,535); Brown, 25th May 1808 (F. C. xiv. 153, No. 43, Ap. 1,
Tailzie, No. 19); Henderson, 21st November 1815 (F. C.); Oliphant,
7th June 1816 (F. C.); Grant, 9th March 1826; Gibson, 24th November
1795 (Mor. 15,869); Ross, 7th March 1795; 5 Brown's Sup. V. p. 909;
Menzies, 25th June 1785 (Mor. Dec. 15,436); Douglas, 5th December
1804; Meldrum, 29th June 1827 (5 S. D. 857); Earl of Fife, 7th
March 1828 (6 S. D. 698); Ascog Case, 23d Feb. 1827, (5 S. D. 418),
reversed 16th July 1830 (4 W. S. 196); 3 Ersk. 8, 30; Haggarts, December
19, 1820 (F. C.); M'Kenzie, 23d May 1823 (2 S. D. 293); Nisbet, 10th
June 1823 (2 S. D. 339).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,
—Solicitors.

MAGISTRATES of DINGWALL and others, Appellants.—*Lord* No. 26.
Advocate (Jeffrey)—Lushington.

HONORABLE MRS. HAY M'KENZIE, with concurrence of His
Majesty's Advocate, Respondent.

Breach of interdict—Fishing.—Circumstances in which (affirming the judgment of
the Court of Session with a qualification) an interdict was renewed against
fishing in part of a river, and although no prayer to that effect was contained in
the petition of complaint.

In 1825, Mrs. Hay M'Kenzie, as heritable proprietrix of the July 11, 1831.
fishings in the river Conon, brought an action against the Ma-
1st Division.

July 11, 1831. gistrates of Dingwall and others, concluding to have it found that she had the exclusive right to fish in the river Conon, and to have them prohibited from fishing there. In defence, it was alleged that the river Stavaig was the same with that of the Conon; that the magistrates held a charter, dated in 1587, giving them right to fish along the banks of the Stavaig river, from a march between the lands of Balblair and Breakenord down to the sea, and that their right to these fishings had been judicially ascertained by a decree of the Court of Session in 1778, in a question with one of Mrs. M'Kenzie's predecessors.

In the course of the preparation of the cause the Lord Ordinary, on the 11th of March 1828, pronounced this interlocutor: " The Lord Ordinary, having heard counsel for the parties upon " the whole cause, and in particular upon the demand now made " for an interdict against the defenders to fish above the march " between the lands of Balblair and Breakenord, in respect it " is averred that the defenders have been fishing above the said " march, which, by their admissions on the record, they are " not entitled to do, in the meantime prohibits, interdicts, and " discharges the said defenders, or any of them, their tenants, " servants, fishers, or dependents, from fishing or killing salmon " in any part of the river Conon above the line delineated on the " plan in process as the march between Balblair and Breaken- " ord; but in respect, the defenders do not admit that the said " line is accurately laid down in the plan, without prejudice to " the parties to ascertain the exact march between Balblair and " Breakenord before the interdict is declared perpetual, grants " diligence at the defenders' instance against havers, for recover- " ing the printed informations in the case which depended be- " tween the commissioners of the annexed estates and the " Magistrates of Dingwall, founded on as res judicata by the " defenders, or copies of these informations, &c." The magis- trates having, as was alleged by Mrs. M'Kenzie, continued to fish above the march, and particularly in two pools called Pool-Oure and Pool-Breakenorde, she, with concurrence of the Lord Advocate, presented a petition and complaint against the magis- trates, alleging that they had violated the interdict, and praying to have it found that they " had been guilty of a contempt of " court and breach of interdict, and in respect thereof to find " and amerciate the said defenders in the sum of 200*l.* sterling,

July 11, 1829.

“ or such other sum or sums of money, or to punish them other-
 “ wise by imprisonment, as in the discretion of your Lordships
 “ shall seem just, and so to deter others from committing the like
 “ in time coming; and further to find the said defenders, con-
 “ junctly and severally, liable to the complainers in the sum of
 “ 1000*l.* of damages, or such other sum, more or less, as your
 “ Lordships may be pleased to modify as the amount thereof,
 “ together with the expences of this complaint and whole pro-
 “ cedure to follow hereon, or to do otherwise in the said whole
 “ matter as to your Lordships shall seem just.” In answer to
 this complaint, the magistrates denied that they had fished above
 the march, and while they admitted that they had fished in the
 two pools, they asserted that these were situated below the march.
 The parties being at issue as to the precise position of the march,
 the Court, on the 4th June 1829, “ before further answer, remit
 “ to Neil M'Lean, land surveyor in Inverness, to examine the
 “ ground on the northern bank of the river Conon, delineated
 “ on the plan by Alexander Sangster, specially referred to in the
 “ pleadings of the parties; and in reference to the site of the old
 “ houses of Breakenord and Balblair, as laid down in that plan,
 “ as also in reference to the entry of the burn of Altnacack into
 “ the river Conon, to ascertain where the line, delineated on the
 “ plan as the march between Balblair and Breakenord, falls to
 “ be placed on the ground, and to strike the bank of the river;
 “ to report to the Court such explanations as he may deem ne-
 “ cessary, of the modes he shall have adopted in following out
 “ the purpose of this remit, accompanied by a hand-sketch suffi-
 “ cient to illustrate the matter in dispute; and he is further
 “ directed to mark on his sketch such parts of the river as shall
 “ be pointed out to him where it is alleged that the magistrates
 “ have fished illegally.” On the report being made by the sur-
 veyor, their Lordships, on the 11th of July 1829, renewed “ the
 “ interdict as granted by the Lord Ordinary against the respon-
 “ dents fishing in the Pool-Oure and Pool-Breakenord; and in
 “ the meantime direct the complainers to keep an exact account
 “ of the fish caught in these two pools; and, with this finding and
 “ direction, remit the cause to the Jury Court to proceed as
 “ directed by the statute.”

The Magistrates of Dingwall and others appealed against this interlocutor.

July 11, 1831.

Appellants.—Although the redress sought by the respondents is confined to a demand for fine, imprisonment, and damages, yet the Court below have by the interlocutor complained of, without any prayer to that effect, renewed the interdict granted by the Lord Ordinary, have extended it beyond its original terms so as to make it applicable to Pool-Oure and Pool-Breake-nord, and have ordered an account of the fish to be kept. The interlocutor, therefore, is clearly ultra petita, is inapplicable to the true state of the rights of the parties, and amounts in effect to a new interdict, different from the original one, for the alleged breach of which alone the complaint was presented. Besides, there was no sufficient evidence laid before the Court to justify them in prohibiting the appellants from fishing in the pools. Indeed, a remit is made to the Jury Court which necessarily assumes that the facts require to be investigated, and therefore it was premature and incompetent to issue such a prohibition.

Respondents.—It was within the power of the Court below, under the complaint, to regulate the interim possession until the matter of fact should be ascertained as to whether there had been a violation of the interdict; and as there was sufficient evidence to satisfy the Court that it was at least doubtful whether the pools were not situated above the march, it was competent for them to prohibit the appellants from fishing there, and to order the respondent to keep an account of the fish which she might there catch.

But assuming that the Court proceeded on the feeling that the appellants had been guilty of a breach of interdict, they were not called on either to fine or imprison, but might competently issue a more mitigated judgment, of which the appellants can have no reason to complain. The proof which was adduced was sufficient to establish that the pools were situated above the march; and as it is admitted that the appellants fished there, they were guilty of a breach of interdict.

Lord Chancellor.—My Lords, this case has now resolved itself into a mere question, with respect to the costs of the present appeal; because as to every thing in the Court below, the whole proceeding appears to be put an end to, in consequence of some considerations unnecessary now to discuss, as they have occurred since the appeal. In this view we must consider the case as it was, when the interlocutor

was appealed from and brought before us for decision. One of the interlocutors in this case, and the governing one, which is not appealed from, is that whereby the Lord Ordinary "prohibits, interdicts, and discharges the said defenders, or any of them, their tenants, servants, fishers, or dependents, from fishing or killing salmon in any part of the river Conon above the line delineated on the plan in process as the march between Balblair and Breakenord; but in respect the defenders do not admit that the said line is accurately laid down in the plan, without prejudice to the parties to ascertain the exact march between Balblair and Breakenord before the interdict is declared perpetual, grants diligence at the defender's instance against havers, for recovering the printed informations in the case which depended between the commissioners of the annexed estates and the Magistrates of Dingwall, founded on as res judicata by the defenders, or copies of these informations." Then comes the interlocutor of the 4th June 1829, which does not carry it much further—does not certainly specify the pools as pools—but refers to the line under dispute. Next we have the interlocutor appealed from—that of the 11th July 1829—and it unfortunately introduces the mention of two pools. If those had been left out, there would have been no doubt that what the Court meant to do by this interlocutor was to renew the former interlocutor; and when you come to examine it very narrowly, it does not seem to be decisive respecting those two pools—for it says, that the respondent shall not fish in those two pools, but that the complainer may fish, keeping an account; which shews that it was to have effect till the final hearing and adjudication of the cause. Nevertheless, it appears to their Lordships, who have considered this case, that, though that is not absolutely inconsistent with the interlocutor of the Lord Ordinary, it certainly would have been much clearer if, professing to renew the interlocutor of the Lord Ordinary, the Court had just adopted the terms he used, and had prohibited the fishing above the line delineated on the plan in process as the march between Balblair and Breakenord, instead of introducing mention of the pools, which leaves a doubt as to their identity. Whether a wrong name may be given to the pool, or the pool has changed its bed, and which would have left open the question as to the physical existence of those pools, which, it is to be observed, in two of the maps out of three, are not named at all—the Pool-Oure and the Pool-Breakenord—their Lordships think that, after this unnecessary introduction of these pools into the last order, it was not unnatural that the appellant should be led into the doubt; they think that he was sent to the inquiry with a certain degree of restraint upon him, which precluded a full and fair inquiry; and, therefore, under

July 11, 1831.

July 11, 1831. these circumstances, we are to consider whether or not the costs should be given, which is now the only question before your Lordships. Without saying that the interlocutor, in its material part, is wrong, I would yet move your Lordships to affirm the judgment, with a declaration, which I shall pen myself, that the mention of these pools shall not affect the question touching the boundary line. There may be still some litigation as to the course of that line, and it is better that we should express, in words, that which is the understanding of the parties, and the feeling of your Lordships. But no costs of appeal can be given.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed, with this declaration, that the mention of Pool-Oure and Pool-Breakenord, in the said interlocutors complained of, shall not prejudice, bind, or at all affect the question touching the course of the boundary line, nor decide whether the said line was below or above the said two pools.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER,
and THOMSON,—Solicitors.

No. 28. JOHN BURNS and ROBERT GRIER, Appellants.—*Lord Advocate*
(Jeffrey)—*Lushington*.

DUNCAN STEWART, Respondent.—*Rutherford—Stuart*.

Contract—Landlord and Tenant.—Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant was not entitled to a stipulated deduction of rent, in respect of not being provided with a road in terms of his lease, a road equally good being enjoyed by him.

July 27, 1831.

1st DIVISION.
Lords Alloway,
Eldin,
Corehouse, and
Newton.

On the 20th of February 1818 a contract of lease was entered into between M'Neill of Raploch (of whom Stewart was the disponee) and Burns and Grier, by which M'Neill let to them the coal within the lands of Raploch for the space of thirty-one years, while they, on the other hand, bound themselves to pay to M'Neill a money rent of 92*l.* 10*s.*, or, in M'Neill's option, a certain lordship. From the first year's rent they were empowered to retain 30*l.* towards making and repairing the roads

to the colliery ; and the tack farther contained this clause : “ And July 27, 1831.
 “ the said R. M. Hamilton M'Neill having engaged to use his
 “ influence to get permission from the family of Hamilton for
 “ the tacksmen to make a road to the coal pit through the Duke
 “ of Hamilton's property to join the turnpike road betwixt
 “ Larkhall and Betton's Yett, it is agreed, that if that permis-
 “ sion is not obtained the tacksmen shall be allowed a deduction
 “ of 7*l.* 10*s.* out of each year's rent to be paid by them to the
 “ proprietors.”

Soon after this time a new line of road between Glasgow and Carlisle was begun, which Stewart alleged had the effect, when formed, to supersede the necessity of the road contemplated by the clause ; that of this Burns and Grier were so satisfied that they never applied to M'Neill to obtain the above permission, and that accordingly they opened a communication with the new road (for the expence of doing which they retained, under the general allowance for road-making, a sum of 30*l.* out of the first two years' rents)—used it from 1821 to 1823, and paid the full rent during these years.

On being charged for payment of the rent due at Nov. 1823, Burns and Grier presented a bill of suspension, claiming deduction of 7*l.* 10*s.* for each of the two preceding years, on the ground that the clause as to the road had not been implemented. The bill having been passed, Lord Alloway pronounced this interlocutor : “ In respect it is stated on the part of the charger Feb. 10, 1824.
 “ (Stewart), that he offers to procure for the use of the sus-
 “ penders the road in question, and that the suspenders (Burns
 “ and Grier) agree to accept of the offer so made, appoints the
 “ charger, within four weeks from this date, to procure for the
 “ above purpose the necessary authority or permission from the
 “ Duke of Hamilton, or other proprietors of the grounds
 “ through which the said road is to run, and to lodge the same
 “ in process, the above appointment being before answer.” To this judgment his Lordship adhered, by refusing a representation on the part of the charger ; and the cause having been thereafter remitted to Lord Eldin, he (Jan. 22, 1825) ordained the charger to “ furnish the road in question to the suspenders
 “ within six months from this date.”

The process was then allowed to fall asleep, and on being wakened a record was prepared in terms of the Judicature Act.

July 27, 1881. The cause having come before Lord Corehouse in place of Lord Eldin, he, before answer, remitted to a surveyor "to inspect
" the roads in dispute between the parties, and to make out a
" plan thereof, and, at the same time, to report his opinion
" what, under a bonâ fide construction of the clause in the lease,
" and taking into consideration the alteration which has been
" made upon the turnpike road between Glasgow and Carlisle,
" would be the most eligible line of road for the suspenders, to
" be made from the working pit to the said turnpike, and to
" state the same in the plan to be prepared by him."

The surveyor having reported, "that the change in the line
" of the Glasgow and Carlisle turnpike has superseded the
" necessity of crossing any part of the Duke of Hamilton's lands,
" to reach the said turnpike," the Lord Ordinary (Newton)
repelled the reasons of suspension, and found expences due. To
March 8, 1880. this judgment the Court adhered.*

Burns and Grier appealed.

Appellants.—1. The interlocutors of Lords Alloway and Eldin, being final, and proceeding on an offer made by the respondent, it was incompetent for the Court to deviate from them, and the appellants are entitled to have effect given to them.

2. Independent of the preceding plea, as it was expressly contracted that the appellants were to have a deduction from their rent in the event of their landlord failing to procure the road there stipulated, and as that road has not been procured, he is not entitled to enforce the contract without giving the deduction there stipulated.

Respondent.—1. The interlocutor of Lord Alloway was specially before answer, and was, besides, abandoned by the appellants, who acquiesced in the remit to the surveyor. If that interlocutor had been conclusive, then such a remit would have been incompetent and superfluous, but the appellants acted on the footing that it was proper and competent. Besides, it

* Shaw and Dunlop, 644.

merely had the effect to ascertain whether the new road was not a sufficient substitute for the one stipulated. July 27, 1831.

2. The appellants have no substantial interest to insist on the road mentioned in the lease being made. The surveyor has reported that the new line of road entirely supersedes the necessity of it, and the appellants have themselves acted upon that footing. If the parties had been aware, when the lease was executed, that the new line was in contemplation, it is quite manifest that the stipulation would never have been made.

Earl of Eldon.—My Lords, having heard the arguments of counsel at your Lordships bar, I have since looked with the greatest attention through the whole of this case; and, having done so, I cannot satisfy myself that the judgment of the Court below ought to be reversed; and, on the other hand, I do not think that this is a case in which I ought to recommend to your Lordships to give costs against the appellant for coming here; and, following the practice of this House, in which it has not been usual to state the reasons which induce the House to form that opinion, where it is an affirmance without costs, I will merely move your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be, and hereby are affirmed.

Appellants' Authorities.—Pollock, Feb. 24, 1777 (No. 4, Appendix, Tack); Graham, 1789; noticed in Mackenzie, Dec. 13, 1811; F. C. M'Intosh, Feb. 1, 1798 (No. 5, Appendix, Tack); Henderson, Feb. 24, 1802, 10,054; Frazer, Feb. 25, 1813, F. C.

RICHARDSON and CONNELL—J. M'QUEEN,—Solicitors.

CATHERINE MUNRO, Appellant.—*Jeffrey—Lushington—Sandford.*

No. 29.

DRUMMOND and others, Respondents.—*Brougham—Keay—Miller—Alison.*

Tailzie—Decision—Held (affirming the judgment of the Court of Session) that an entailed estate held by an heir in possession under a strict entail, on which infestment had followed in his favour, was liable to be adjudged for personal debt, contracted subsequent to the infestment, but prior to the recording the entail,

although the adjudication was not raised or decree obtained thereon until after the entail had been recorded.

The case of Smollett, May 14, 1807, (Mor. Dec. App. 12. voce Tailzie,) was not shaken by, nor intended to be shaken by, the judgment in the House of Lords in the case of Agnew of Sheuchan, July 31, 1822.—(1 Shaw's App., page 320.)

Aug. 30, 1831.

FIRST DIVISION.
Lord Newton.

GEORGE ROSS of Cromarty executed in 1783 a deed of entail, whereby, under the restrictions and limitations therein contained, he disposed the estate of Cromarty to the heirs-male of his own body, and their heirs-male; whom failing, to the heirs-female of his own body, and their heirs-male; whom failing, to his nephew uterine Alexander Gray, and his heirs-male; whom failing, to Jane Kirk, the entailer's sister, and the heirs-male or female of her body,—the eldest heir-female always succeeding without division, and excluding heirs-portioners; whom failing, over. The deed contains special prohibitions against alienation and contracting of debt; and the resolute clause declares, that if the said heirs-male or female of the said George Ross's own body, or any of the said heirs of tailzie, shall do any thing in the contrary of these provisions, either by disposing of the said premises, or committing any crime or delict, or by contracting debts, or doing any other act or deed as above mentioned, either before or after his or their succession, under and by virtue of the said tailzie, the said acts and deeds used, and all and every one of them, shall not only be void and null in so far as shall concern the said lands, heritages, and estates, so as they shall not in any manner of way be affected therewith, to the prejudice of the said entail and the heirs entitled to succeed to the said tailzied estate; but also, the said contraveners being descended of the said George Ross's own body, for themselves allanarly, and all other contraveners for themselves, as well as for the descendants of their own bodies respectively, shall amit and forfeit their right and interest in the said lands, heritages, and others, and the same shall immediately devolve upon and pertain to the next heir of tailzie. No commission was granted for recording the entail; but, of the same date, he executed a trust deed in the English form, naming, among others, Alexander Gray and John Ogilvie, trustees, with instructions, out of unentailed funds conveyed to them, to pay off the debts affecting the Cromarty estate, and to record immediately the entail. The trustees accepted, and entered on the management under the trust, but did not record the entail.

One object of the trust was to pay off the debts affecting the estate of Cromarty, and there is a special declaration in the trust-deed, that the trustees should immediately record the deed of entail. Aug. 30, 1831.

Upon the death of George Ross, in 1787, Alexander Gray took the name of Ross, and, as the first heir of entail under the deed, succeeded to the estate of Cromarty. He was infest on the deed of entail; and the whole clauses, prohibitory, irritant, and resolute, were inserted in the body of the sasine. Alexander Ross was a partner in the army agency house in London, Ross and Ogilvie, and contracted the following, among other, debts to Messrs. Drummond, bankers in London:—9,000*l.* by promissory note bearing date in the year 1796, in the name of Ross and Ogilvie; 5,000*l.* by a joint and several bond by Ross and Ogilvie in the same year; and 10,000*l.* in the year 1798, also contained in a promissory note by Ross and Ogilvie. As collateral security of these sums, Ross and Ogilvie put in deposit with the Messrs. Drummond private bonds and exchequer bills to a large amount. In 1803, while these debts remained unextinguished except to a partial extent, and while they remained personal, the entail was recorded at the instance of one of the substitute heirs.

In May 1805 a commission of bankruptcy issued against Ross and Ogilvie. In 1805 Messrs. Drummond, by an action in the Court of Session, constituted their debt against Alexander Ross, and thereafter, in 1806, obtained adjudication against the estate of Cromarty; the decree reserving all objections contra executionem. In 1820 Alexander Ross died without lawful issue.* In 1826 Catherine Munro, wife of Hugh Rose, and next heir of entail, raised action of reduction of the adjudication taken by the Messrs. Drummond. Several minor points were involved in the discussion which followed†; but chiefly the pursuers, founding on the above statement, and particularly on the fact that the

* 4 Wilson & Shaw, page 289.

† In 1788 and 1800 Alexander Ross had executed heritable bonds over the estate of Cromarty for debts contracted by himself, in consequence of which Catherine Munro brought an action of irritancy against him, and in January 1805 obtained decree in absence. But the decree was kept open by representations, and ultimately proceedings on this point were allowed to sleep. Also, in the discussion under the action of reduction, the pursuer raised the objection of *pluris petitio*, but the question decided in the House of Lords was that stated in the text.

Aug. 30, 1831. entail was recorded, although not until after the debts were contracted, yet before they were made real on the entailed estate, contended that the estate could not be carried off, to the prejudice of the heirs of entail, in payment of these debts and obligations. The Lord Ordinary, in ordering cases to the Court, observed,—
“ The Lord Ordinary sees nothing in the pursuers argument to
“ induce him to think that the case of Smollet was erroneously
“ decided ; but as the authority of this case is alleged to have been
“ weakened by the judgment of the House of Lords in the
“ Sheuchan case, he thinks it proper to report the present case,
“ that the opinion of the Court may be obtained ;” and the Court (11th June 1828), on advising these cases, and whole proceedings in the cause, sustained the defences, assoilzied the defenders from the whole conclusions of the libel, and decerned, but found no expences due.*

Catherine Munro appealed.

(*Jeffrey*) for Appellant—The present question is of deep interest to the parties concerned, and of even greater importance to the law. It involves the first principles of entail law ; at the same time it is simple in its nature, and capable of being presented in a very distinct view. It has been considered as ruled by the case of Smollet ; but that decision was not appealed. It was not unanimous ; it is single, and in its circumstances does not apply to the question here at issue.

There the entail had not been recorded. The heir in possession contracted personal debt ; then the entail was recorded. After his death the right heir made up titles to the estate, and served himself heir of entail to the contravener ; then the creditor of the deceased heir adjudged the estate. The Court took this view of the question,—that, except as far as the heir is tied up by fetters, he holds in fee-simple. The persons who contract with him look to the record of tailzie, to ascertain in what character he holds the land, and what power he has over the land. They are entitled to rely on the record, and, not finding an entail of the land, are authorized to hold that they can deal

† 6 Shaw and Dunlop, p. 945.

with the heir as an unlimited proprietor. But, while this appears to have been the principle on which the Court proceeded, two distinctions were overlooked:—1. That here the contraction of debt was not with an individual, but with a copartnery;—2. That the documents of debt did not afford action against Alexander Ross's person without the intervention of other proceedings, for instance, an action of constitution; but this action was not raised until after the entail was recorded. This case being toto cœlo different, the appellant was entitled to a different judgment from what was pronounced in Smollet's case; and at all events the House should send it to the Court below for reconsideration, especially since Smollet's case, even upon its own facts, has always been doubted by the bar. Aug. 30, 1831.

The appellant relies on this great and important point, that, independent of legal principles of genuine equity, the statute 1685 affords an invulnerable protection to all estates, fenced as directed, against all attempts to carry them away for debts contracted by the person on whom the entail is binding. The statute, right or wrong, (we think rightly,) has rendered harmless all adjudications on debts contracted by any heir of entail bound by the entail. There is an immense waste of learning on the part of the respondents, in order to show that the estate is not protected against the entailer's debts; and it is clear that the estate is not (with certain exceptions). Heirs who succeed take *titulo lucrativo*, and necessarily represent the entailer. It is the statute 1685 which introduces the necessity of recording. Without a reference to the statute, to see what on this point is directed, the respondents have not a shadow of a case. It may be difficult to say whether the recording is an actual enjoinder; but, waiving that inquiry, it is enough to say, that the declarator of irritancy is directed *primo loco* and alone against contravening. Now, we say that the mere contraction of debt is not a contravention of the entail. If it were otherwise no heir of entail could run an account with a tradesman; he could not live according to the ordinary habits of society. But it is the contracting debt, whereby the estate may be evicted and carried away and adjudged, which the statute contemplated. The mere contraction of debt is not a contravention. It is admitted by the respondents, that, after the entail is recorded, debts contracted subsequently to the recording are not effectual against the estate;

Aug. 30, 1881. why then direct a denunciation against mere contracting personal debts, and why should the statute protect the estate against debts contracted before? The personal creditors only can potentially create an act of contravention. But while the debts remain personal, where is the danger? But we are asked, how is the estate protected against personal creditors? and we answer, it is not necessary to protect an estate against personal debts. It would have been absurd and preposterous if any such protection had been attempted; a man cannot live without contracting debt; and did any sane person ever contend that an heir of entail had disobeyed the injunctions of the entailer because he ran accounts with tradesmen? It implies an absurdity to allege that the statute protects the estate against such personal debts. The statute expressly says, that the entail is not to be operative until certain things be done, and then to be good against contraveners and their creditors. But there is no contravention while the debts are personal, and therefore there are, while the debts remain personal, no debts of a contravener. In short, we maintain that what is prohibited is, not the contraction of debt, but the adjudication of the estate by the creditor, or a voluntary conveyance of, or burden granted over, the estate, to the creditor, by the heir in possession who has contracted debt (the legal and conventional titles mentioned in the statute.) But if there has been no contravention, then nothing has been done contrary to the injunctions of the entail. The creditor has not been let in before the recording, and the recording, while matters stand thus, closes the cheque.

The statute says, whenever the injunctions are completed, then the entail is a bulwark against all eviction. It is admitted that the entail becomes so if the debts have been contracted after the recording; and why should it not have the same effect before the recording? If the statute is to have this effect upon all debts contracted after recording, of what consequence is it that some debts were personal before? Are we not covered sufficiently if we have the whole panoply of arms on us before the debts are made real? The previous contraction is no contravention. The statute is imperfect in common sense and principle if it did not mean to protect the estate from all debts, if not already made real. The object of the statute was to strike at voluntary conveyances, or allowing an adjudication to be led,

but not to strike at the mere contraction of debt. We maintain, Aug. 30, 1831. that if the requisites of the statute be attended to, and if the entail be recorded, that the substitute heir of entail springs up like Minerva armed from head to foot, and being thus armed before any attempt has been made to touch his estate, how can personal creditors injure him? Observe also, that it is not made a ground of forfeiture in the heir that he does not record the entail; yet, if the whole estate is exposed to be carried away by personal debts contracted before the recording, would the legislature not have provided against this fatal consequence by making it a forfeiture not to record. The only inference which fairly follows is, that the legislature did not for a moment contemplate that debts allowed to remain personal at the date of the recording could affect the estate.

Various views of the statute lead irresistibly to the same conclusion. The statute clearly had in view, in this enactment, both personal and real creditors; but it directs its injunctions only against the latter. It classes the creditors, and places the creditors whose claims are to be effectual along with singular successors,—“creditors, comprysers, adjudgers, and other singular “successors whatsoever.” But singular successors are persons who have bargained for and purchased a right. They stand in contra-distinction to a mere general representative, who succeeds to a right, and takes on him the responsibility of his author. The singular successor has a single title—an onerous right acquired for a consideration; and here it is quite plain that the statute did not contemplate a mere personal right, but a right of the nature of a right vested in a compryser or adjudger. If the heir in possession contracts personal debt, but which debt has not been made real, and the next heir sues (on a valid ground) a contravention, and makes up titles, and records, we deny that there is any authority for holding that the personal creditors of the forfeited heir could claim the character of singular successors, and take the estate. We may here observe, that the argument in Smollet’s case was not well treated. Great part of the reasoning by the creditors was founded on a fallacy,—a mere sophistical reading of the act,—that the person who dealt with the heir is to be protected, even if the heir be forfeited; but they carried this too far, for the clause founded on by them does not relate to recording, and it cannot in con-

Aug. 30, 1831. sistency with fair argument. That is quite clear ; and if so, how can you account for forfeiture for non-recording being omitted, if the legislature intended that the estate should be liable when the heir in possession contracts personal debts, and does not record ? The true answer is, that it was considered necessary only to protect a certain class of creditors ; namely, those who had clothed themselves with another character than merely that of personal creditors, and had become adjudgers, comprisers, or singular successors. Therefore, tota re perspecta, and giving the most natural consideration to this statute,—the charter of all entails,—have we not made out, that it means only to afford a protection against the sale, or the encumbering of the entailed estate, and that the mere existence of personal debts was regarded by the legislature as a matter of perfect indifference ? On this view, that the heir in possession committed no contravention of the entail, and that personal creditors are not contemplated by this statute, and that they took no step to let themselves in, we are inclined to rest with perfect confidence : we cannot anticipate a satisfactory answer. In aid of what we have stated, there comes a most important inquiry. On what principle should the vested interests of substitute heirs give way to the claims of personal creditors, rather than the claims of personal creditors give way to the vested interests of the substitute heirs ? Take an instance from the analogy of unfettered property. A possessor of a fee-simple estate sells or grants heritable securities over the land after he has contracted large debts. This conduct may be blameable, but the personal creditor will be excluded. They left their debts personal, and the preference of the purchaser or real creditor (except in cases of bankruptcy, as provided for in the bankrupt statutes,) will be unchallengeable. The answer to the claims of the personal creditor is simple, “sibi imputet,” that he did not secure himself on the land. The personal creditor cannot be at a loss. He has the record of infestments to go to. If the infestment of his debtor, or rather of the person who purposes to become his debtor, is silent as to fetters, the party can deal with him in safety ; but if the existence of fetters is seen in the recorded infestment, as directed by the statute, then the creditor perceives that he is exposed to the utmost hazard to deal with the heir. Even if the record of tailzies does not yet contain this entail,

Aug. 80, 1831,

every creditor knows that the next instant the entail may be recorded; and if, nevertheless, he still deals with the heir, he does so at his own risk, and must be supposed to look to the heir's personal sufficiency, and not to the entailed estate. But, in such circumstances, can a creditor be allowed to make a clamour that he is a loser; or will the Court strain principles, and strive to shut out justice, in order to relieve him? Look for a moment to the principle on which the respondent places his case. He says, that a man's property should be subject to his debts, and a person without an onerous title has no right to stand in competition with claimants who have an onerous title. Now, in answer, we shall shortly say, that, first, the respondent must show he is a creditor, and a creditor contemplated by the statute—of this we have largely spoken; second, that the heirs substitute have no onerosity. We are unwilling to enter upon a great deal of legal detail to be found in the case of *Sheuchan*. We shall satisfy ourselves by saying, that, long before the statute 1685, entails had been introduced, and were known, and held to be valid at common law. How far, under any circumstances, the entailer's estate could be saved from the entailer's debts, has been the subject of much discussion and difference of opinion. The ground on which the *Sheuchan* case was decided appears from the report, and needs no further detail here. It fixes, that if an heir of entail possessing an estate is under a personal obligation, in favour of substitutes, to preserve these substitutes' rights entire, then the substitutes can compete with personal creditors; and it follows, that if the recording has taken place before the personal debts are made real, the substitute heirs will exclude the creditors. Here the creditor of one heir of entail is competing with the creditor of another. We say creditor; for although, as relates to the entailer, a substitute may be merely a gratuitous donee, yet, in a question with another heir of entail, he is an onerous creditor. The onerosity is plain. Alexander Ross was himself a gratuitous disponee; but is not the appellant his onerous creditor? There is a great deal of authority on this point to be obtained from the recent decisions in the case of *Ascog and Bruce*; but even on these cases it is not necessary for us to rely altogether. If an entailed estate be actually gone, there may be a difficulty in protecting the succeed-

Aug. 30, 1831. ing heirs; but we are not contending for the recovery, but for the preservation of the estate. If substitutes act with diligence and promptitude, and creditors hang back, why should the creditors not suffer? The case of *Sheuchan* affords a valuable commentary in that view. Indeed it supports us equally as we have shown that the statute 1685 itself does. There are other minor observations, all tending to the same conclusion; but we are anxious to place our case on those simple and prominent principles which stand by themselves, and do not require the aid of ample elucidation. One important commentary, however, is afforded by the case of *Denham*. But if, as there found, personal creditors of a personal heir in possession have no claim on the land, because they can only take the estate *tantum et tale* as it stood in their debtor, how much more should that be the case when the creditors are told by the infetment that it is unsafe to deal with him unless they immediately make their right real. All the argument of the respondent has been unavailing to strike out an intelligible distinction between the two cases; and if, in *Denham* and *Baillie*, the creditor could not reach the estate, neither ought the respondent in the case before the House. The case of *Sheuchan* deserves minute attention, as the principles on which it rests support every argument of the appellant. Even where in its facts that case differs from the present, that very distinction acts as a favourable authority; and the opinion of the learned Lord (Eldon), who entered so fully into the law of the question, shakes to the foundation all that has been said and reasoned in favour of the case of *Smollet*.

Earl of Eldon.—Are you instructed to state, what has been the dealing out of Court, as to creditor and debtor, in consequence of this judgment; what has followed the decision of *Smollet*?

Jeffrey.—Since that decision transactions have in several instances been entered into, in reliance on *Smollet* being well decided. I have been consulted, but I have always given my opinion that many doubts existed as to the soundness of the case.

Earl of Eldon.—It would be proper for us to know how much our judgment, if a reversal, would be disturbing the practice and transactions of men, and how much we would not be disturbing.

Jeffrey.—Speaking from my own experience, I have always found it doubted, whether *Smollet's* case was well decided, and the

profession were anxious that the matter were settled by a judgment of your Lordships. Aug. 30, 1831.

Brougham.—We shall soon show your Lordships the extent to which transactions have been gone into, and what has been the practice following that judgment.

(*Brougham*) for Respondents.—This is an appeal of a solemn judgment, involving a point already decided by the cases of *Grahame*, *Ferrier*, and *Smollet*; cases which at the time received great and deliberate attention, which ever since have been uniformly acted upon, and repeatedly, and in very peculiar circumstances, sanctioned by the legislature. Under such circumstances we feel no apprehension of failing in satisfying this House that the judgment under appeal rests on sound and legal principles. Let us then take the case where it truly lies:—the consequences of the recording the entail after the debts were contracted; but before they were made real on the entailed estate. Much light will be thrown on the inquiry by attending to the principles which govern cases of this kind. 1. It is clear that wherever an owner of a landed estate, by contracting debts, becomes personally bound to the creditors, he gives to the creditors a right to proceed against that estate, which right they may make real and obligatory upon the estate. Until legal means are taken to tie up the owner, and prevent creditors contracting with him, the estate is a subject from which the debts can be recovered; and although a *jus in re* be not instantly created, yet, by measures to be adopted, the debts can be fastened on the land. 2. If an heir succeeds to an entailed estate, that heir represents his ancestor, and is liable to the creditors of that ancestor in every case, and to the whole extent of the claims, except in so far as the entail has effectually prohibited the ancestor from contracting debt. But if the entail has permitted or not effectually prohibited debt to be contracted by the ancestor, then the heir of entail is liable, in the same way as the ancestor would have been. We have stated the exception,—“unless effectually prohibited.” If he be not effectually prohibited, then, we repeat, that the next succeeding heir of entail becomes liable, and is liable. In the case of *Reidhaugh*, because the entail irritated the deed of contravention, but did not irritate the contravener’s right, and left no effectual and absolute prohibition

Aug. 30, 1831. against contracting debt, the Court, on account of this absence of resolving the contravener's right, held a succeeding substitute liable for the debts of the preceding substitute. There are several reports of the case, all strongly elucidating and strengthening our argument. Now, where, in principle, does the difference lie between that case and the present? Unless the appellant means to contend that an entail can be effectual without registration, it is quite clear that the case we have cited is a distinct authority for the respondent. Just change the objection, from want of resolving the contravener's right, to want of recording, and the very words of the argument become applicable to the case before us.

Then take the case of *Phelp*. There the substitute heir in possession was obliged to pay a predecessor's debt, because the entail had not been recorded. We have shown, that the case cited before afforded an instance where the same consequence followed from want of the contravener's right being resolved. The same principle was the foundation of both judgments. The case of *Baillie* confirms this doctrine. In short, if, where, through a defect in the fetters of the entail, the succeeding substitute is liable for the debts contracted by a predecessor, so ought a succeeding substitute, where the entail not having been recorded, the entail has not been perfected according as the statute enjoins. But the appellant says, that there is a class of creditors who, notwithstanding of the imperfection of an entail, cannot go against the estate, and that the respondent is one of that class. But the appellants, while they assume the existence of such a class as a principle, have not attempted to show us a warrant for such a distinction—for a distinction between one kind of debt and another, or between one kind of creditors and another,—nor would it be easy to discover such a warrant. In truth, the position is inconsistent with the principles of the law of Scotland applicable to cases of this kind, and unsupported by decision or dictum. Thus, for a moment, consider the kind of obligations against which the fetters of an entail are directed. The parties named are “creditors, comprysers, and adjudgers.” It is said, the creditor here named is an heritable creditor—a creditor who has by the process of law clothed himself with the character of compryser or adjudger, and therefore, the respondent being only

Aug. 30, 1831.

a personal creditor, there was no contravention, and the respondent was not let in before the cheque was shut by the recording. But if the word "creditor" meant an heritable creditor, why use other descriptive terms? If a creditor holds an heritable bond, he takes infeftment, and enters into possession. He does not need to compryse or adjudge. Clearly, therefore, when the statute speaks of a compryser and adjudger, it does not mean that kind of creditor; but if it does not mean a real creditor, it must mean a personal creditor. If you look to the whole statute, you will find that it is utterly irreconcilable with its provisions to give the meaning to the word creditor on which the appellants have now chosen to build their whole case. How are you to get quit of the express clause at the beginning of the statute, that it shall not be lawful, &c. to contract debt, &c.? Where is the authority for adding—"debt made a real charge on the land?" Besides, what more fit term could have been used than "creditors?" Are there any more general terms which would include personal creditors?—and is it not clear, that when you add, "whereby the said land may be evicted," &c., the meaning is sufficiently explained to be, that it is a contravention for an heir to contract debt whereby the land may be evicted? If I contract personal debt, do I not do a deed whereby the land may be evicted; and is not that as much a contravention as if, from the instant of its creation, the debt had been real? and if so, (which seems undeniable,) what becomes of the appellant's argument? To say a word as to the *jus crediti* of the succeeding heirs: any plausibility which the argument on that point possesses arises from the incorrect view, taken in relation to this matter, of the term *jus crediti*. This phrase is rather figurative than strict; it is rather a right in the nature of a *jus crediti* than a pure *jus crediti* itself. From analogy, the heirs are described as standing in the relation of debtor and creditor, but not in the strict meaning of these words. Accordingly, although it be held that an heir has a good claim for reparation, or specific performance, against a previous heir who contravenes, that is not because the one is the creditor (in the ordinary acceptation of the word) of the other. The appellant's doctrine would let in a *pari passu* preference between heirs and creditors; a doctrine too absurd to require refutation. In all questions with creditors the heir holds the

Aug. 30, 1831.

gratuitous character of the first donee; of this he cannot divest himself. What character he may be entitled to in questions *inter hæredes* is not the point at issue; we need not therefore discuss it, nor shall we detain the House a moment longer on the point. As to the cases, the appellant seems to hold it strange that a judge should feel himself bound by a former judgment; but with us we are accustomed to think that following precedent is a salutary and a wise rule. Feeling how weak the appellant's case was here, Smollet's case has been very critically canvassed. The minority in that case were, we believe, three; the rest, many of them composed of the ablest judges who have ever sat on the Scotch bench, voted for the creditors, the winning party. That case, we contend, settled the law, and was, by the profession, understood to be the law; and we shall immediately show the House to what extent this judgment has been acted on, as having settled the law. But there are also the cases of Grahame and Ferrier, both tending to the same conclusion. It has, however, been said, that none of these cases were appealed to this House. But would it not be going too far to maintain that a rule of law, adopted by the Court below after the most solemn deliberation and discussion, acted on by lawyers in their opinions, by the people in their transactions, by the judges in their proceedings, is to be taken for nothing because in these cases the losing party has not appealed? How many valuable interests, how many extensive estates are there, the rights to which depend on decisions which never have been appealed? It is unnecessary to pursue this matter; but we may add, that there may be often a very good ground for not appealing; namely, where the party thinks his case too hopeless to proceed further. Would it not be too much to expect that a party would still appeal, merely that, at a great expense, he might have the satisfaction (or rather for the satisfaction of others) of going the utmost possible length of litigation. We could add many elucidations of the soundness of the doctrine for which we contend. We shall only venture on one more; the case of interdiction (a very apt case, for the doctrine of entails was introduced into the Scotch law by analogy to interdictions). If a person be grossly improvident, he can be interdicted. If he has executed a disposition of his property before interdiction,

Aug. 30, 1831.

it is a good disposition, and will be obligatory ; not so, if after the interdict is recorded. But suppose the improvident person contracts debt before he can by legal process make the debt good against the estate,—an interdict is recorded ; the debt is good, notwithstanding the recorded interdiction. One of your Lordships asked, if in practice creditors had dealt with their debtors on the faith that the case of Smollet was well decided. Now, we have better evidence of the fact than mere opinions of lawyers ; on this point we have the high authority of acts of parliament. We hold in our hands a list of acts of parliament obtained during the reign of his present Majesty, by heirs of entail, to enable them to sell part of the entailed estate for payment of debts contracted before the entail was recorded. The heirs, without such parliamentary authority, could not sell ; for although the entail, unrecorded, was not good against creditors, it is against the heirs “ themselves,” and the diligence of the creditors would be ruinously expensive. The heir in possession, therefore, applies to parliament, and remit is made to the Court of Session to report, and they, in all the cases, have reported that the debt of the substitutes affected, or might be made to affect, the entailed estates of his ancestors, and the act of parliament followed almost as a matter of course. Was that not acting on the law as laid down in Smollet’s case ? or what more would the appellant require ? The sum total for which entailed estates have been sold, during the present reign, for debts in the situation we have described, amounts to above 800,000*l.* sterling. Thus, take the instance of the act to enable Charles Marquis of Queensberry to sell parts of the estates entailed by Charles Duke of Queensberry and Dover in 1769, for payment of debts contracted by the Marquis prior to May 1818, when the Duke’s deed of entail was duly recorded. There, in respect the said debts were contracted prior to the recording of the said deed of entail, and affected, or might affect, the said entailed lands, a portion of the entailed estate, to meet debts to the amount of 84,866*l.*, was sold. Now, what was the meaning of all this ; According to the appellant’s view of the case, all the heir in possession had to do was to record the entail, and that would have shut out the creditors ! See also the case of the Galloway estates. There the statute tells you that the great proportion of the debts due were personal ; i. e. the very kind of debts the

Aug. 30, 1831. contracting of which the appellant has laboured to prove did not amount to a contravention, and cannot compete with an heir of entail who records before the debt is made real; yet lands to the value of above 300,000*l.* were sold to pay creditors, the great proportion of whom were merely personal creditors. But if what the appellant has stated be sound, what wholesale spoliation has been committed! Parliament has robbed unborn heirs of entail to an amount of more than 800,000*l.*, and that in confederacy with the judges of Scotland, who reported that such robbery was legal. Only another point remains to be noticed. It is an incorrect view to assert that entails were recognized at common law before the statute. Had they been recognized at common law, the preamble would have been different. As to the argument as to a race of diligence, and the deduction that the creditors are to blame if they did not timeously secure themselves by making their debts real, it is founded on too obvious a fallacy to deserve detailed refutation. On the whole, whether we look to principle or precedent, or what has followed in the Scotch courts and in parliament, we arrive at the same conclusion, that the creditors are not excluded by the recording the entail after contraction, but before the debts were made real.

(*Jeffrey*) for Appellant, in reply.—When examined, the case of *Grahame* is not an authority for the respondents, worthy of being regarded in the light of a precedent sufficient to fix in our law a rule of law so important as the 'one attempted to be reared up; and even if the case of *Ferrier* were free from specialties, it only followed *Smollet*, and therefore cannot be held to be an authority for *Smollet*. But it has been contended that the rule is now fixed in our law, and that on the supposition that the rule was fixed, many interests and transactions have been created and concluded, all of which would be vacated if the present case were reversed; and in support of their averment reference has been made to several private statutes. Now, the first of these is dated in 1824, and in some of the cases, we don't know how many, the debts had ceased to be personal. Thus, in the sale of part of *Raith's* estate, a conveyance had been made to a trustee, and infestment actually taken; but what sort of authority is this to set up against a single judgment, doubted by every lawyer, and held unsound by some of the ablest judges who ever

Aug. 30, 1831.

presided? Is it an argument for allowing a judgment, unsound in principle and unjust in its consequences, to remain unrecalled in our records? The respondent rests his case on a single ground, that the contraction of debt is a contravention; that is a vital point; but we submit that we have unanswerably shown that such a view is utterly irreconcilable with the statute itself, and involves the wildest absurdities, while our interpretation is consistent and simple. Indeed, there we regard ourselves as covered with tenfold armour, and that we are invulnerable. It was never dreamt that the simple contracting of debt was a contravention. Indeed, the whole tenor of our authorities shows that the contracting of debt, without something else following, is quite innocuous. The argument of the respondent on this point is ingenious, but we cannot consider it as sound; and, having no other authority but ingenuity, we feel ourselves confirmed in our belief that our reading is correct, and our views are rested on a sure and imperturbable footing. There is a plain distinction between the cases put and quoted by the respondent, to show that where debt is not effectually prohibited the creditor can come against the succeeding heir. In these cases, as you cannot add to a defective entail, and correct its errors, the flaw must remain; but the omission to record is not a durable evil; it is temporary and can be remedied in a moment, and the instant it is cured all personal debts are excluded. In the cases quoted, the personal debts would have been excluded, if it had been competent for any of the heirs to have thrown in a clause, resolving the right of a contravener, or otherwise completing and perfecting the fetters of the entail. We shall not repeat what has been said at the bar as to the *jus crediti* of the heirs of entail. Even the concession that *inter hæredes* they are creditors is sufficient for our argument. If we are in any way creditors, then the situation of parties is just the case of a race for priority, and we having recorded, i. e. perfected our right, before the respondent has adjudged, i. e. perfected his right, we have actually reached the goal and gained the preference. It seems to be thought, that because Alexander Ross could have been ousted of his possession had he lived, that therefore a proof is afforded that contracting debt is a contravention. But this is a mistake; he would have been ousted, not because he had contracted debt,

Aug. 30, 1831. but because the creditors proceeded to adjudge the estate for payment of that debt.

One word more as to Smollet's case, although what we are about to observe may be gathered from our opening. The present case is, in its feature, totally different from Smollet's; for here the creditor is not like the creditor of the individual, as in Smollet's case, who knew that the debtor had no other funds than the entailed estate, but a creditor of a company. The very decree of constitution of the debt was taken against the company; nay, the documents of debt were not at the time a foundation for immediate diligence to follow upon. Even, therefore, if Smollet's case had been appealed and affirmed, it would not necessarily have decided the present case, and we now come for a judgment on a case which, if it resembles Smollet's, has only been decided once, and if it does not resemble Smollet's, is a point perfectly open. Again, we repeat that on the bench, at the bar, and by our ablest writers, the case of Smollet has not been regarded as an authority fixing this very important point. The very decision on the bench, and the known talents of the minority, are sufficient to create in every thinking mind the most serious doubts whether the same judgment would have been pronounced in the present day. It is quite right that we should adhere to precedent, but not to a bad one, where single. The sound view is, to stand by a series rerum judicatarum: but can that be described to be the situation of the decisions on this point? It was expected that Smollet's case would have been appealed, but minority, or some such reason, delayed the measure, and it was ultimately abandoned. We close our argument with calling the attention of the House to one point. The heirs substitutes know nothing of the contractions of debt by the heir in possession, and ought to be protected. But the creditors cannot be ignorant that they themselves are dealing with an heir of entail; are parting with their money; that the heir of entail is borrowing, and the next moment may record the entail. From the former, activity cannot be expected; the other is bound by every consideration of prudence to make his debts real; if he does not, he must suffer for his supineness, and has no reasonable ground of complaint that this penalty falls on him.

Earl of Eldon.—When an entailed estate is sold at the instance of a creditor, the entail being defective, is there any evidence of what was done with the surplus money? If a debt be contracted, where debts are not effectually prohibited the heir in possession can be called on to pay. If that be ordered by decree of the Court, and the estate be sold, how do the Court deal with the price over the amount of debt? Is the money ordered to be laid out in the same way and to the same uses as before? Aug. 30, 1831.

Jeffrey, in answer, explained the case of Strathnaven.

Earl of Eldon continued.—Much pains have been taken, in other cases which came before us, to show the difficulty of laying out the money, but the Court has never told us how they are to carry into effect the principle of *jus crediti*. No one can doubt that to some extent entails were good before 1685, but to what precise extent it may be difficult to say.

Lord Lyndhurst.—My Lords, I am to move your Lordships for judgment in the case of *Munro v. Drummond*. This case was originally an action of reduction brought in the Courts of Scotland, for the purpose of reducing a decree of adjudication which had been pronounced in that Court. The Court of Session decided in favour of the defendants, and from that decision the pursuer has appealed to your Lordships' House; and the question is, whether the judgment of the Court below, substantially affirming the decree of adjudication, ought to be sustained. My Lords, the circumstances out of which this case originates are shortly these. George Ross was seised in fee of the estate of Cromarty in the year 1783. In that year he executed a deed of strict entail of that estate, by which he entailed the estate upon himself and the heirs of his body, and on default of such issue then upon his nephew uterine Alexander Gray, and the heirs-male of his body; whom failing, to Jean Kirk the entailer's neice, the pursuer's mother, and the heirs of her body; and upon failure of that issue then over. George Ross dying without leaving issue, Alexander Gray became entitled to the entailed estate, and in the year 1787, took infestment of that estate, and changed his name from Alexander Gray to Alexander Ross. Alexander Ross, in the year 1820, died without male issue, in consequence of which the present appellant, Mrs. Munro, daughter of Jean Kirk, became entitled as next substitute under the deed of entail. My Lords, this is the nature of the estate. Alexander Ross, who took the estate under this deed of entail, in the year 1787, carrying on business at that time in partnership with John Ogilvy in London, as army agents, contracted a considerable debt with Messrs. Drum-

Aug. 30, 1831. mond, the bankers, whom the present respondents represent. That debt originated in a promissory note in the name of the firm of Ross and Ogilvy, for the sum of 9,000*l.*, bearing date in the year 1796. In the same year there was a further debt of 5,000*l.* secured by the joint and several bond of Ross and Ogilvy; and in the year 1798 a further debt of 10,000*l.* was incurred, secured by a promissory note of the firm of Ross and Ogilvy. Exchequer bills to a considerable amount, bonds, and other instruments of a similar description, were deposited with them for the purpose of securing this large debt. In 1803 the deed of entail was recorded. In the year 1804, my Lords, Messrs. Ross and Ogilvy became bankrupts; and in consequence Messrs. Drummond instituted proceedings in the Court of Session, which terminated in a decree of constitution in 1806, establishing a debt to the amount of 18,000*l.*, the original debt being 24,000*l.*, and it being reduced to the sum of 18,000*l.* by the sale of exchequer bills, which I have said were deposited in the hands of Messrs. Drummond by way of collateral security. Upon this decree of constitution, a decree of adjudication, in the year 1808 was afterwards pronounced, and, my Lords, it is that decree of adjudication which is the subject of the present suit of reduction. The recording of the entail was previous to the date of the decree, but posterior to the contraction of the debts. The question for your Lordships' consideration, and which is one of much importance, is this:—The present respondents being the personal creditors of the bankrupt, Alexander Ross, the deed of entail being recorded in 1803, while the debt was a mere personal debt of Alexander Ross, and the adjudication not taking place until 1808, the question is, under these circumstances, whether this decree of adjudication against this entailed estate, pronounced subsequently to the period when the entail was recorded, can or can not be sustained. My Lords, when this case came on, a noble and learned Lord*, conversant not only with Scotch law in general, but conversant deeply with this particular branch of Scotch law, namely the law of entail, attended here, on account of the importance of the question, for the purpose of hearing the discussions and arguments at your Lordships' bar. The case has stood over from time to time, in order that I might have the opportunity of attending with that noble Lord, and that he might move your Lordships for judgment in this case. Circumstances, however, have interfered to prevent it. But I have had an interview with that noble and learned Lord, who, in consequence of indisposition, has been under the necessity of leaving town. I

* The Earl of Eldon.

know his views of the subject, and they entirely concur with my own, and in moving this judgment I beg that it may be considered I am acting according to the opinion and judgment of that noble and learned Lord, as well as according to the opinion and judgment which I myself have formed, after hearing the arguments at your Lordships' bar, and after reading with considerable attention the printed papers and cases referred to. Aug. 30, 1831.

My Lords, it is unnecessary for me to trouble you with any observations upon the law of entail as it existed at common law in Scotland, because according to my view of the subject this case turns entirely on the construction of the statute 1685. My Lords, by that statute power was given to His Majesty's subjects in Scotland to entail their estates in certain forms, subject to certain restrictions; and those forms and those restrictions are distinctly and clearly pointed out in the statute; and it is declared in that statute, that those entails shall only be allowed in which irritant and resolute clauses are inserted in the procuratories of resignation, and the charters, precepts, and instruments of seisin, and which are produced before the Lords of Session for the purpose of being recorded, and which are recorded in the manner stated in the act. It appears to me, that nothing can be more distinct than the language of the act in this respect, that those entails only are to be allowed which are executed, registered, and recorded according to the provisions and directions of the act. The act afterwards goes on to say, (for that is the construction which I put upon the act, and the construction which my noble and learned friend puts on the act,) that those regulations having been complied with, the entail shall "be real and effectual against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles." Some doubt has arisen with respect to the construction of those last words; and it is contended by the appellant, that the meaning is this: that they shall be binding on the creditors, whether they "are comprisers or adjudgers, or other singular successors, by legal or conventional titles," thereby excluding personal creditors. But my Lords, I apprehend that that is not the natural construction of the clause. The natural and obvious construction, as it appears to me, is this, that they are to be binding against creditors generally, and not only against creditors generally, but against those creditors who claim by comprising, adjudication, or such other creditors as come under the description of singular successors, whether by real or conventional titles. If then this be the construction which I put upon the act, and which the noble and learned Lord puts upon the act, it is binding upon personal creditors, provided the requisites of the act are complied with; and it follows, therefore, as a matter

Aug. 30, 1831. of course, that if the requisites of the act are not complied with, that in that case it is not binding on the personal creditors. Looking, therefore, at the first clause of the act, it is declared that those tailzies shall be allowed which conform to the requisites of the statute, and that those entails shall be binding against the personal creditors only in case those requisites are complied with; and if they are not complied with, then that they shall not be binding against the personal creditors, and the party entitled to the estate will have no claim under the entail. But, my Lords, it is said, that true it is, or true it may be, that an entail is not binding against a personal creditor unless the requisites of the act are complied with; but that when it is recorded, from that moment it is binding against the personal creditor, unless the personal creditor has, previously to the recording of the entail, led an adjudication against the estate. My Lords, I apprehend that that was not the meaning of the legislature. The intention of the legislature, by requiring the entail to be recorded, was, that notice should be given to all the world that the party in possession held under an entail; and the obvious meaning of the act is this, that unless the entail is recorded the party is to be considered, not as holding under the entail, but as holding in fee-simple, and that the claims of the creditor with respect to the land are precisely the same as if, instead of the party being entitled only to an estate in tail, he was entitled to an estate in fee-simple. If that be the case, it is quite impossible, as it appears to me, that the legislature could ever intend that a subsequent recording of the entail should have a retrospective effect, so as to defeat the right of the creditor; because, if that be the construction of the act, the very object of the act would be entirely defeated, for at any moment, the entail not being put on record, parties having advanced money to the person entitled to the entailed estate, advancing that money upon the assumption that the estate was an estate held in fee-simple, would instantly be deprived of their right upon the estate by the mere fact of recording, which recording might instantly be effected. It appears to me, therefore, that the legislature never could have intended that, and that in point of fact to put that construction on the act of 1685 would defeat the very object which the legislature had in view in passing that act. Then, my Lords, here the Messrs. Drummond being personal creditors to a very large amount, continuing personal creditors for a long period after Alexander Ross was infeft in this estate, but the recording the entail taking place before they obtained their decree of adjudication, that did not defeat the right of Messrs. Drummond to go on with their adjudication, and to make their claim against the estate real and effectual, precisely in the same way as if, instead of being an

estate-tail, it had been an estate in fee-simple. This is the view of the subject the noble and learned Lord, to whom I have referred, has taken of it. But, my Lords, this does not depend solely on the construction of the act of parliament; it becomes material to inquire whether there are any authorities upon this subject, and what is the effect of those authorities. My Lords, the well-known case of Smollet was cited at your Lordships' bar. It was not pretended that the case of Smollet differed, as far as relates to the point to which I am now calling your Lordships' attention, in the slightest degree from the case now under consideration. It was admitted by the counsel for the appellant that (to use the phrase of the lawyers) it was a case, as to this point, on all-fours with the present. My Lords, that case was decided by the Court of Session as far back as the year 1807. It was decided, after very full argument, and after much debate and consideration. I am bound to say, that the President of the Court, Sir Ilay Campbell, a very great lawyer, did not acquiesce in that decision; but still, the great majority of the Court of Session were in favour of it. My Lords, that decision was acquiesced in; it was not made the subject of appeal, as it might have been, to your Lordships' House; and from that day to the present period, a period of twenty-four years, this very point, so decided in Smollet's case, has been acted upon, and no contrary decision is to be found. But, my Lords, previously to Smollet's case, the same question came before the Court in the case of the Creditors of Grahame. In that case the point was raised, but not argued. It was decided, without argument, in a manner conformable to the decision in Smollet's case. It may be said, the point not having been argued, not having been agitated, that is a case not entitled to much weight. I cite it, my Lords, not as entitled to much weight as a decision of the Court, but I cite it, as showing what the opinion of the lawyers of Scotland was, with respect to that question, twelve years before the decision of the case of Smollet. But, my Lords, since the decision of the case of Smollet, the question has again arisen in the case of Ferrier. That case arose between six and seven years after the case of Smollet, and the decision originally was the same way with that of Smollet. It was there considered that those personal debts which existed previously to the recording of the entail were binding, when followed up by adjudication subsequent to the recording of the entail; and the decision in the first instance proceeded on that ground; it was in favour of the creditors. That decision, however, was afterwards altered, but altered on special circumstances, entirely conformable with the principle of the original decision, and which was this, that it turned out, on subsequent inquiry, that the money which was the foundation

Aug. 30, 1831.

Aug. 30, 1831. of the debt was not actually advanced until after the entail was recorded. I consider the case of Ferrier as a strong authority confirming the decision in the case of Smollet. I have stated that there is no contradictory, no opposing decision. But it has been supposed that the case of Sheuchan, decided in your Lordships' House, is at variance with the principle of the decision in that case of Smollet; and some remarks and observations made by the noble and learned Lord who moved the judgment in the case of Sheuchan have been much insisted on by both sides, in the course of the argument. It is important, however, that I should state, from the knowledge I have of the noble and learned Lord to whom I am referring, from the conversations I have had with him on this question, that he himself does not consider the decision in Sheuchan's case as adverse to the decision in Smollet's case. He does not consider that any expressions which fell from him in moving that judgment, and which are ascribed to him, are at all inconsistent with the view of the case he now takes. My Lords, in Sheuchan's case the entail was executed in consequence of a valuable and monied consideration. There was an actual purchase of the settlement. The parties, therefore, entitled under that settlement, were in the nature of creditors upon the estate; they were as much creditors as any other of the creditors of the person who was the owner of the estate, the settler, who was John Vans; and it was upon that principle, and upon that principle alone, the question was decided. The situation, therefore, in which the parties then stood, and the nature of the transaction, were widely different from the present; and it would be to put a very forced construction on the case of Sheuchan to extend it to a case like the present. It appears to me that the case of Sheuchan does not in principle militate against the case of Smollet, that the case of Smollet falls far short of it in principle, and that the language made use of by the noble Lord who moved that judgment is not at all at variance with the case of Smollet; and, therefore, that that case, supported as it is by the decision in Ferrier, and supported as it is to a certain extent by the case of the creditors of Grahame, stands unopposed by any conflicting authority. Upon the whole, my Lords, it appears to me that the sound and true construction of the act of parliament is that which I have stated, namely, that until every thing that is required by the statute 1685 is complied with the party is to be considered as holding, not an estate in tail, but an estate in fee-simple; that it is liable to his personal creditors; that a subsequent recording of the entail will not have a retrospective effect, so as to defeat the right and title of the creditors; that, if you allowed it such an effect, it would in point of fact destroy and disappoint the very object of

the act of parliament. Resting, then, my Lords, upon this construction of the statute, and fortified by the decisions to which I have referred your Lordships, it appears to me, the decision of the Court of Session, sustaining the decree of adjudication, is correct, and ought to be affirmed. It is proper, however, my Lords, that I should state, that with respect to that decree of adjudication there were several other points (some of them material and important points) which were urged at your Lordships' bar, and also urged in the Court below. But the attention of the Court of Session appears to have been directed solely to the question to which I have called your Lordships' attention; they seem to have passed over for the present the other objections made to the decree of adjudication. Therefore, acting also in conformity with the opinion expressed by my noble and learned friend, to whom I have referred, I would advise your Lordships to state what your opinion is upon the first point, and then remit the whole case to the Court of Session, in order that they may do what is just and proper with reference to the other points presented to their consideration, and to which they do not appear so much to have attended, waiting your Lordships' decision upon this, which was the great and material point agitated before them. Under these circumstances, I shall move your Lordships that this case be remitted to the Court of Session, with an expression of your Lordships' opinion in the terms I have referred to. Aug. 30, 1831.

It is declared, by the Lords Spiritual and Temporal in Parliament assembled, That the registration of the deed of entail prior to the date of the decrees of constitution and adjudication does not, in this case, bar the claims of the creditors against the entailed estate in respect of debts contracted prior to such registration; and with this declaration it is ordered and adjudged, That this cause be remitted back to the First Division of the Court of Session in Scotland, to proceed therein as shall be just, and consistent with this declaration, it not being the intention of this House to give an opinion upon any other points arising between the said parties in this cause.

Appellants' Authorities.—Grahame, 13th May 1795 (Mor. 15,439); Agnew, House of Lords, 31st July 1822 (1 S. Ap. Ca. 333); Creditors of Smollet, 14th May 1807 (F. C. 13,629, No. 279); Mackenzie on Taillies, vol. ii. p. 489; 3 Ersk. 8, 26; 1 Bell, p. 51; Ferrier, 10th December 1813 (F. C. xvii. 486, No. 131); Case of Sheuchan (1 Shaw's App. p. 356); Syme, 14th February 1801 (F. C.); Denham, Creditors of Carleton, 21st November 1753; 3 Ersk. 8, 32;

Aug. 30, 1831.

Wauchop, 1st July 1817 (F. C. xix. 365, No. 126); Roxburghe and Queensberry's Cases (1 Shaw, p. 169); Mordaunt and Duke of Gordon, 5th July 1822 (Morrison's Dic., Tailzie); Lord Strathnaven, 2d February 1728, and 15th February 1730; Stewart, 23d February 1827 (5 S. D. 418); Marquis of Queensberry, 7th March 1828 (6 S. D. 706); 1685, c. 2; 2 Ersk. 8, 32; M'Whinnie, 4th February 1796 (Mor. 125); Mackinnell's Ranking, 9th June 1797 (M. 312); M'Neill, 7th March 1794 (Mor. 122).

Respondents' Authorities.—3 Blackstone, p. 207, note 11, 15th Edit.; 1 Bell, p. 393, 5th Edit.; Russell, 23d May 1792; 1 Bell, p. 394–5; Rucker, B. R. T. 29, 6, 3; 1 Selwyn's Nisi Prius, p. 137; Searle, 2 Stra. 820; Ves. sen. 4356; Chitty, 378; 2 Stair, 3, 58; 1, 14, 6; 4, 18, 6–7; 3 Ersk. 8, 25; 1685, cap. 32; Case of Sheuchan, 31st July 1822; 1 Shaw's Appeal Cases, p. 325; 3 Ersk. 8, 38, 39, 40; Willison, 26th February 1724 (Mor. 15,369); Douglas, 2d February 1758; Case of Ascog (23d Feb. 1827, 5 S. D. 418; reversed 16th July 1830, 4 W. S. 196); Graham, 9th June 1743 (M. 13,010); Kilkerran, 545; 1 Ersk. 7, 54, 56; 1 Stair, 6, 41; 1 Ersk. 7, 53; Case of Stormont (Mor. Dic. 13,998); 1 Bell, 48, 5th Edition; Philp, 14th December 1758 (M. 15,609); Earl of Rosebery, 22d June 1765 (M. 15,616); 26th November 1761; Lord Kinnaird, 26th June 1776; Irvine of Drum (22d Dec. 1710, Mor. 553); Grahame, 13th May 1795 (Mor. 15,439); Sandford on Entails; Smollet, 14th May 1807 (Mor. Ap. 1, Tailzie, No. 12); Ferrier, 10th December 1813 (F. C. xvii. 486, No. 131); 2 Bell, 46, note 4, 3d Edition; 3 Ersk. 8, 26; 2 Bank. 2, vol. i. p. 585; 2 Stair, 3, 58; Thomson, 2d July 1812; 2 Ersk. 11, 7; 2, 12, 16; 4 Ersk. 1, 38; 2, 11; 3 Stair, 2, 21; 1 Bell's Com. p. 212, 3d Edit.; Jackson, 28th January 1676 (Mor. 8362); Massey, 12th July 1785 (Mor. 8377); 2 Bell, 195, note 1; 4 Ersk. 1, 40; 2 Bell, 212, 3d Edit.; 2 Bell, 215, 8th Edit.; Bank of Scotland, 9th July 1709 (Forbes, 304); Young, November 1688 (Harc. 35); Duff, 22d July 1742 (Kilk. 48); 2 Bell, 192; Duchess of Douglas, 26th July 1764 (Mor. 2833–8390); M'Culloch, 21st July 1627 (Mor. 1689); Binning, 5th December 1749 (M. 2832–8389); Horne and Lyle, Young Dic. 1078; Drummond (Dic. 1079); Mackay, 23d November 1798 (Mor. 11,171) Wauchope, 1st July 1817 (F. C.).

RICHARDSON and CONNELL,—BROUGHTON and WHITE,—
Solicitors.

No. 30. LEYS, MASSON, and Co., Appellants.—*Attorney General*
(Denman) — *Lord Advocate* (Jeffrey) — *Dr. Lushington*.

LORD FORBES and others, Respondents.—*Spankie*.

Fishing — Process — Issue.—Held (affirming the judgment of the Court of Session), that where an issue was sent to a jury as to whether a dam dyke was “to the injury and damage of the pursuers” as proprietors of salmon fishings in a river, it was not competent for the judge to direct the jury that the question

put in issue, and the only question which they were to consider, was, whether it was injurious in the actual condition of the river, and with reference to the existence of the dykes in the river. Observed, that it is incompetent to construe the issues by referring to the previous pleadings.

LORD FORBES and others raised an action of declarator and damages, before the Court of Session, against Leys, Masson, and Co., setting forth that the pursuers had right to the salmon fishings in the river Don adjacent to their respective properties, and had thereby a sufficient title and interest to protect these fishings against all injury and encroachment; that the defenders were in possession, under a lease or a feu right, of part of the lands of Grandholme, stretching along the north bank of the Don, on which they had erected, in 1810, a large flax-spinning manufactory and a bleachfield; that, without the knowledge or consent of the pursuers, the defenders had taken upon themselves to open a canal or watercourse from the Don, for the purpose of supplying those new works, and had, at a later period, erected a dam-dyke stretching across the river, whereby they were enabled to carry off in the watercourse such a quantity of water that at times the channel of the Don for about half a mile below the dam-dyke was completely dry; and that at all times the passage of salmon was rendered difficult, and often impossible, by want of such a slap in the dam-dyke as is required by the statute 1696, c. 33. The pursuers, therefore, concluded to have it found:—1. That the pursuers never had nor have they yet acquired any right or title to carry off any part of the water of the river Don for the supply of their spinning-mill and bleachfield; that they should be ordained “instantly to shut up the
“inlet and watercourse at present used for that purpose, in such
“way and manner that no part of the river Don may be thereby
“withdrawn in time coming;” and be “interdicted from con-
“structing or executing, in time coming, any new intake, water-
“course, or canal upon or for the use of the lands of Grand-
“holme, or the machinery erected or to be erected thereon:” 2. That it should be declared that the defenders “never had nor
“have they yet acquired any right or title to build, erect, or
“construct any dam-dyke across the river Don connected with
“the said lands of Grandholme;” and they should be “ordained
“immediately to remove and take away the said dam-dyke, and
“to restore the channel of the river Don to the state in which

Sept. 7, 1831.

2D DIVISION.
Jury Court.

Sept. 7, 1831.

“ it was before the dam-dyke was at all constructed ;” and should be “ prohibited and discharged to rebuild the said dam-dyke at “ Grandholme, or to construct any other dam-dyke or obstruc- “ tion of the like kind, which may interrupt or impede the course “ of the river and the free passage of the salmon ;” or, at least, that such dam-dyke should be built in a form consistent with the statute 1696, c. 33: And, lastly, that the defenders should be ordained to pay 10,000*l.* of damages. This last conclusion was eventually abandoned.

In defence, Leys, Masson, and Co. alleged, 1. That as there were several dam-dykes built across the river higher up than the one in question, and below the pursuers properties, they had no interest to have the one in question removed; 2. That the canal and dam-dyke were not injurious to the pursuers; who, 3dly, had acquiesced in the erection of the same.

With reference to the first of these pleas, Lord Cringletie, Ordinary, (Jan. 22, 1823,) found, “ that even admitting that “ there are various dykes across the said river, yet the dyke in “ question, being the farthest down the river, the pursuers are in “ point of interest entitled to begin with it, and are not bound, “ before regulating it, to raise actions for regulating the others; “ and, therefore, on the whole, finds, that they have an interest “ sufficient to entitle them to pursue the action, sustains also “ the title of the pursuers, and appoints them to put in a con- “ descendence, in terms of the act of sederunt, of what they “ allege, and offer to prove on the merits.”

Against this judgment the defenders represented; but the Lord Ordinary (May 13, 1823) refused the representation, and issued a full note of his opinion, in which he observed, *inter alia*, that “ it seems of no importance how many dykes there may be “ across the river. The dyke of the representers (defenders) is “ the lowest down the river; and, unless the pursuers were to “ attack the whole at once, they must begin with the first ob- “ struction, because the proprietor of any other dyke would “ object, that the pursuers could have no interest to remove it as “ long as any one farther down existed; it is, therefore, the “ natural course to begin with the dyke of the representers. “ Every heritor of salmon fishings has a right to remove obstruc- “ tions in the river, though these obstructions be placed on the “ property of another; for every one knows that salmon run up

“ a river to spawn, and if they be prevented the fishing must Sept. 7, 1831.
“ perish. It may be true that the interest of the whole pursuers
“ is small, when compared with that of the representers; but
“ that is absolutely nothing in the eye of law or justice; for if
“ any man has an interest at all, he is entitled to defend it, and
“ is not to have it sacrificed to that of his opulent neighbour.”
To these judgments the Inner house adhered, on the 14th of July
1823, and 13th of January 1824. *

After a record had been prepared, the Court, before answer,
remitted “ to the clerks of the Jury Court to prepare the draft
“ of an issue or issues fitted for the trial by a jury of the facts
“ therein alleged and disputed by the parties, to be reported to
“ this Court *quam primum*.”

The following issues were thereupon reported to and approved
of by the Court: “ It being admitted, that in the years 1792
“ and 1793, the defenders, Leys, Masson, and Co., cut a canal
“ on the north side of the river Don, for the purpose of convey-
“ ing water from the said river to Grandholme Haugh, where
“ the bleachfield and manufactory of the defenders are situated;
“ and that in the year 1805 the defenders formed a dam-dyke
“ across the said river for the purpose of conveying water into
“ the said canal: Primo, whether the said canal, cut as afore-
“ said, is to the injury and damage of the pursuers, or of any
“ and which of them, as proprietors of salmon fishings in the said
“ river? Secundo, whether the said dam-dyke, formed as afore-
“ said, is to the injury and damage of the pursuers, or of any
“ and which of them, as proprietors of salmon fishings in the
“ said river? Tertio, whether the whole, or any, or which of
“ the pursuers, or their predecessors or authors, or their com-
“ missioners, trustees, or agents duly authorized, acquiesced in
“ the formation and continuance of the said canal? Quarto,
“ whether the whole, or any, and which of the pursuers, or their
“ predecessors or authors, or their commissioners, trustees, or
“ agents duly authorized, acquiesced in the erection or conti-
“ nuance of the said dam-dyke?” The Court farther directed,
that, on the trial of the first and second of the issues, Lord
Forbes and others should stand as pursuers, and that Leys,

Sept. 7, 1831.

Masson, and Co. should stand as pursuers on the trial of the third and fourth.

The case was tried before Lord Gillies on the 14th of June 1830, when Lord Forbes and others gave in evidence, inter alia, the interlocutors, and note of Lord Cringletie, and the judgments of the Court adhering to these interlocutors; while Leys, Masson, and Co. adduced evidence to show, that in consequence of the existence of other dam-dykes the one in question was not injurious to Lord Forbes and others. After the proof was concluded, “ Lord Gillies (as set forth in the bill of exceptions after mentioned) did then and there deliver it as his
“ opinion and direction to the jury in point of law, with regard
“ to the meaning and construction of the aforesaid first and
“ second issues, that the question put in the issue, and the only
“ question they had to consider, was this,—Is the dyke injurious
“ to the pursuers’ fishings in the actual state of the river and of
“ other dykes? and not whether it would be injurious to them if
“ other dykes were demolished or properly regulated. And the
“ jury aforesaid then and there delivered their verdict upon the
“ first and second issues for the said defenders (Leys, Masson,
“ and Co.); and against the said pursuers (Lord Forbes and others).
“ Whereupon the counsel for the said pursuers did then and there,
“ on behalf of the said pursuers, except to the aforesaid opinion
“ and direction of the said Lord Gillies; and that Lord Gillies,
“ instead of the direction given by him as aforesaid, should have
“ directed the aforesaid jury, that—the Court of Session having
“ already decided by a final judgment that the said pursuers
“ were not bound to raise actions for removing or regulating the
“ other obstructions in the river Don before challenging the
“ canal and dam-dyke formed by the said defenders—the point
“ meant to be tried by the first and second issues, and the ques-
“ tion which the jury had to consider under them, was, whether
“ the said canal and dam-dyke of the said defenders were inju-
“ rious to the fishings of the said pursuers, without reference to
“ the injury occasioned by the other obstructions in the river;
“ and further, that as the cruive-dyke might be regulated at all
“ times in terms of law, and that as the other dykes, in so far
“ as they were encroachments injurious to the fishings of the
“ said pursuers, might be removed or properly regulated, and
“ as the trial between the parties aforesaid did not depend on

“ the objections or defences in regard to any other obstructions, Sept. 7, 1831.
 “ the evidence led with regard to the effects of the other ob-
 “ structions on the river was irrelevant; and that the injury
 “ occasioned by them, in their present state, to the fishings of the
 “ pursuers, ought not to be taken into consideration of the said
 “ jury in returning their verdict on the said issues.”

A bill of exceptions having been tendered to the second division, their Lordships, on the 11th of March 1831*, allowed the exception, and appointed the same issues to be again tried by another jury.†

† 9 Shaw and Dunlop, 933.

* *Lord Justice Clerk* observed,—My Lords, in this case we have had a very full and able argument; the question upon which we are now to decide has been very ably discussed by counsel on both sides of the bar; and for one, I must confess, that I am not ashamed to acknowledge that the questions appeared to me to be attended with difficulty, and that difficulty seems to be increased from the shape in which the question is brought before your Lordships. This question does not occur on a motion for a new trial in regard to any thing that occurred on which to set aside the verdict in reference to the evidence which was adduced in the cause. There is no motion founded on any objection to the evidence; but the case comes before us in the shape of an exception to the charge of the Judge, which is said to have affected the verdict of the jury by putting a certain construction upon the issue which they were to try. This is the shape in which the case comes for decision; but I fairly confess, that in my opinion the case would have presented itself in a much more satisfactory manner had there been a distinct motion before your Lordships excepting to the evidence, or the admissibility of the evidence, which was adduced. But there is this advantage to the party excepting, in the shape in which the case comes here:—in taking the exception to the charge of the Judge, the party, if dissatisfied with our decision, may go elsewhere, by appeal to the House of Lords; while, upon a motion for a new trial, if that were either refused or allowed, our decision would have been conclusive and final, not being subject to appeal or review in any manner of way. Parties have certainly this advantage of the form which has been adopted, although I confess the other would have been more convenient, and much more satisfactory to me.

My Lords, I am unwilling unnecessarily to go over the proceedings in this case; but the view which I take of it renders it necessary to bring under your Lordships' notice, however tedious it seems, the proceedings which took place in this action. It was brought by certain upper heritors on the river, complaining of the operations of the defenders in constructing a canal and dam-dyke across the river Don, which had, as they the pursuers state, the effect of interfering with or impeding the course of the river, and of injuring the fishings of the proprietors above, by obstructing and preventing the passage of the salmon up the stream. It is in this respect just like the complaint of the upper heritors on the Tay, complaining of the operations of the inferior heritors, which was before us in that question.

Sept. 7, 1831.

Ley, Masson, and Co. appealed.

The case came into Court, and was met with the defences with which your Lordships are acquainted, and which I think it important to be before your Lordships in forming your judgment; because, although there is an objection in the defence stated to the title and interest of the pursuers generally, there is not, as far as I can discover, any special statement in these defences that there are other operations in the river Don which occasion such obstruction, as while they remain would render that of the defenders harmless. There is a distinct exception to the title and interest of the pursuers, but there is nothing whatever said in regard to other obstructions in these defences. The case came originally before my Lord Cringletie, as ordinary, under the old form of process, and his Lordship pronounced a judgment, with an explanatory note, upon the 2d January 1823, in which his Lordship repels the defences in regard to the title, "Finds that the pursuers have an interest sufficient to entitle them to pursue the action, sustains also the title of the pursuers, and appoints them to put in a condescence, in terms of the act of sederunt, of what they allege and offer to prove on the merits." A representation was put in against that interlocutor, calling his Lordship's attention more particularly to the views of the party, and to the mistake in regard to the other dykes being higher up the river. The lowest dyke mentioned by the Lord Ordinary clearly did not mean a cruive dyke, but that of a manufacturing company, and in that the Lord Ordinary was perfectly correct, and therefore I don't think the mistake was worth a straw in reference to the question. But that judgment is brought under his Lordship's review, and his Lordship pronounces another interlocutor adhering to the former one.

A petition was presented against that judgment to the Court, to which, on its own showing, we did not think it necessary to take an answer, and it was refused without answers; but, according to the forms of the Court, the party were entitled to give in, and a reclaiming petition was given in, and your Lordships ordered it to be answered by Lord Forbes, &c. This was accordingly done; and in these papers the case was most fully argued, and it was put to your Lordships, again and again, that although the title had been sustained, yet, as the river Don was encumbered with dykes innumerable, to the extent of fourteen or fifteen, it was impossible to have any idea that the opening of a canal, such as that of the defenders, could do any harm at all; and that, therefore, supposing the title to be good, yet "you the pursuers have no interest sufficient to follow out the action." That is most elaborately stated in the pleadings; and your Lordships, after paying all the attention possible, did come to a unanimous opinion that the interlocutor of Lord Cringletie was well founded. I have looked to my notes of what took place on that occasion, and they are very full. I must take the liberty of reading from them.

My Lord Craigie says, "Wherever a person has a right of salmon fishing in a river, he can object to measures that tend to diminish the numbers or obstruct the passage of salmon;" and Lord Glenlee said, that he did not differ from the opinion given, and agreed with Lord Craigie's first observation, that, however trifling the interest might be, a party was entitled to object to any operation that tended to diminish or impede the salmon in a river.

The case after this went back to the Lord Ordinary, and condescences and answers were lodged, which were respectively revised; and your Lordships will observe, that the Lord Ordinary first made a remit of the cause to the Jury Court,

Appellants.—The present question is not encumbered with an inquiry into the propriety or impropriety of the structure of the

Sept. 7, 1831.

but he afterwards altered that interlocutor, and took the cause to report, upon information which were accordingly boxed to your Lordships; and there again, in these pleadings, it was argued, that when you take into consideration the nature of these works, and when you consider the time when they were erected, and the enormous expence attending them, and that in regard to one of them it had stood so far back as 1793, and stood from that time, and that the other had stood from the year 1805, there were sufficient materials to warrant your Lordship to find, that, even admitting the title and interest of the pursuers to be unquestionable, that your Lordships had no ground to find them illegal, and that the answer to the pursuers was sufficient:—"You have acquiesced, and you are barred, after such acquiescence, from making the demand in which you now insist."

This was met on the other side in this simple way, "That suppose we admit to you the whole doctrine of acquiescence as contended for, and although persons who see works of this description going on in suo may be barred by acquiescence, yet we make this specific averment, that we were in entire ignorance of them;" that we knew nothing of them at all, and had no knowledge of their existence. Lord Forbes was a military man, and was not in the country, and he had not succeeded to his father, and knew nothing whatever about the operations. Others of the pursuers said, that neither they nor their predecessors knew any thing of them, and, until 1813, when Mr. Farquharson was made acquainted with the matter, and took a protest, down to that period they were in utter ignorance of what was going on, and they cannot be held to have acquiesced in that of which they knew nothing. Two of the Judges of this Division of the Court were of opinion, that the length of time, the *prima facie* evidence of knowledge from the magnitude and vast importance of the works, the expenditure which appeared from the books to have been employed in supporting them, and the fact, that there were four thousand individuals who were supported by these works, and who, if they were abated, would be driven into absolute poverty, afforded sufficient ground upon which to find that acquiescence must have been presumed. To Lord Glenlee it appeared, that if ever a proposition was clear in the law of Scotland it was this, that before a party can be cut out from trying a question by acquiescence it must be made out that he knew what he was acquiescing in. Just to look back to my notes upon that occasion, I see that I expressed an opinion, which I still entertain, that to say a person has acquiesced who was ignorant of the proceedings to which his acquiescence was pleaded was a doctrine to which I could not subscribe.

The case came repeatedly before us; and in January 1828 your Lordships came to adopt the step of ordaining the pursuers individually to put in an articulate condescendence, as to their or their predecessors alleged ignorance of the acts complained of, and that in six weeks, and ordain the same to be answered, and the papers for the parties to be revised, printed, and boxed on or before the first box-day in the ensuing vacation. This was previous to the draft of the issues, which was afterwards prepared. This order is renewed on 28th February 1828; and in May 1828 answers are ordered, and the parties appointed to revise respectively. The cause is at last put up for advising by your Lordships. And I have only to beg your Lordships to attend to this, that in the last condescendence and answers given in by the parties there is not one syllable that I have been able to discover that

Sept. 7. 1831. issues; these were adjusted by the Court at the sight of the parties, approved of, and sent to trial. Neither is there under

refers to the different obstructions in the river; but the whole of the statements refer to the knowledge or want of knowledge of the parties of these proceedings and operations going on, with this exception, that in the concluding paragraph of the answers there are just these words: "In conclusion, the respondents beg leave to add, that they still adhere to all the averments contained in their full answers to the pursuer's original condescendence of the merits of the cause in process." My Lords, that is all I can discover which refers to what had gone before, and the answers are confined to the averments made in the condescendence in regard to what they knew of the operations complained of. Now, my Lords, when we advised this condescendence and answers, we pronounced the interlocutor which is in these words:—"13th May 1829, the Lords having resumed consideration of this cause, with former proceedings, and heard counsel thereon, of consent assolzie the defenders from these conclusions for damages as set forth in the summons, and assolzie the defenders in toto from the other conclusions of the summons, in so far as these were formerly insisted in by Lieutenant General John Gordon Cumming Skene of Pitling, and the trustees of the late George Skene of Skene, esquire, and decern."* We assolzied from the conclusion of damages, and the reason was, that the pursuers had abandoned that conclusion, in consequence of a doubt which had been started, how far they who had separate interests could sue for damages jointly. And while we did this, I read from the interlocutor, before farther answer—"Remit this condescendence and answers to the Clerks of the Jury Court, to prepare the draft of an issue or issues fitted for the trial by a jury of the facts therein alleged and disputed by the parties, to be reported to the Court quam primum."

Now, my Lords, observe this. It may not be absolutely conclusive of what I conceive the issue should be, and which is just in conformity with this view; but it showed what we had in view when we pronounced this interlocutor, and that this should be a direction to the Jury Clerks in preparing the issue, as to whether the pursuers were in the knowledge of and acquiesced in the matters complained of, which are just the words here used. The case goes to the Jury Clerks, and they prepared for your Lordships consideration the draft which I now hold in my hand, and which came before the Court for consideration on 16th June 1829. We were busied a considerable portion of that day in adjusting the terms of the two last issues on acquiescence, and here are various suggestions on the margin, some of which were not adopted; but the issues are afterwards approved of, and sent to the jury in the form they now stand—"Whether the whole, or any, and which of the pursuers, or their predecessors or authors, or their commissioners, trustees, or agents duly authorized, acquiesced in the formation and continuance of the said canal?" and, quarto, "Whether the whole, or any, and which of the pursuers, or their predecessors or authors, or their commissioners, trustees, or agents duly authorized, acquiesced in the erection or continuance of the said dam-dyke?" These two issues were adjusted on the 16th of June, and I have marked on my papers issues as to acquiescence adjusted quoad ultra delay. The case is again taken up on the 27th June, and those two issues, as to whether the canal and the dam-dyke are to the injury and damage of the pursuers, are finally settled by the word "was" being

* These parties had withdrawn from the action.

discussion the relevancy or irrelevancy of the evidence sent to the jury; any challenge on that head is too late. Nor is there

Sept. 7, 1831.

taken out, and the word "is" being put in. They had originally stood, "Whether the canal 'was' to the damage," &c.; and we changed them into "Whether the canal 'is' to the damage," &c. Thus, having looked to all my notes which I have of what took place upon the different occasions when the case was before us, to discover whether there were any circumstances stated at the time that called our attention to the special injury, I can discover nothing more than what I have stated to your Lordships.

Now, my Lords, on this full statement of the proceedings, for which I beg pardon in having detained your Lordships so long, but which was necessary to keep in view the way in which my opinion has been framed, it is perfectly manifest to me, in the first place, that the object which we then had in view was to ascertain whether there were sufficient materials for entering on the defence of acquiescence at all; and that was what the Court meant to entertain; and that it certainly never was meant, at least by me for one, and I conceive that there is not an indication of the intention of any one of your Lordships, to send to the Jury Court the question, or to let an issue be tried, whether, supposing all the other fourteen dykes in the river Don, with the addition of the cruive-dykes, to be constructed contrary to law, is the dyke of Leys, Masson, and Company, one which in law is injurious to the higher heritors on the river. Such a thing was never hinted to your Lordships. It is not contained in the papers or any where else; there is nothing there sent to the Jury Court except the issue, which is, "Whether the said canal, cut as aforesaid, is to the injury and damage of the pursuers, as proprietors of salmon fishings in the said river." This is all that appears, and the case goes to the Jury Court upon that issue. We had given the most unequivocal opinion, in adhering to the interlocutor of the Lord Ordinary, that it was no answer to the action to tell the pursuers that there are other obstructions in the river which did as much or greater harm than those complained of. We did not think it necessary to expatiate upon the possibility of putting down all or any of these dykes, or to enter on the consideration of the various hypothetical questions as to the effect of their being regulated or not regulated according to law; but were we not entitled to take into view, if this were averred, that they were regulated according to law? And, if that had been done, is any one prepared to say, that in this river, or in the Tay, or in any other river, because there are dam-dykes and formidable obstructions, and therefore no salmon can get up the river, this would be a good defence, without inquiring as to the nature and character of these dam-dykes themselves. The thing is truly ridiculous. The upper heritors are entitled to have this thing abated, if it is unlawfully there; and therefore, my Lords, it did not occur to me that that was within the case, or even in our contemplation to consider; or that, if a wall was built fifty feet high, by which a complete obstruction was formed, that would be good defence from the mere fact of being there; because, if the argument is good for any thing, it amounts to this, that because other people may do that which is contrary to law, and because they have done so, you have no right to complain of me for committing the same offence. No such proposition was made use of or brought forward, for if it had, and before we adjusted issues of this description, we would and must have deprived them of all ambiguity of meaning, and would have put them something in this shape:—supposing these other obstructions to be permanent and irremovable,

Sept. 7, 1831. room for inquiring as to the preponderancy of evidence as to the permanency, or the reverse, of the other obstructions on the

does this operation of the defenders do injury? We were bound to have expressed it, if we meant to have such a question tried on the issues; but nothing of the kind is there, and nothing of the kind, I apprehend, ever came across the minds of any of the Judges, in attempting to set aside that bone of contention, which I am sorry to say existed between the parties, and in some respects in the Court itself; but the issue was only meant to try the question, if there was acquiescence, or not, on the part of the pursuers. And I have no idea of the object being to try the question, if these obstructions were removed, would those of the defenders be injurious or not? And well do I know, that in reference to the trial that was coming on I had my own views in relation to the subject of acquiescence.

But, as it is, though we may be perhaps blamable in not having called for a little more explanation at this time, if the defenders had the purpose for which they now contend, I am of opinion for one, that they ought to have spoken it out plainly; and if they had, I have no hesitation in saying, that the issue must have been framed in other language, and expressed in a manner which would have rendered it *locus clarius* what was to be tried. We should then have had an issue, supposing the dyke of Gordon, Baron, and Company to be removed, and the cruive-dykes or other obstructions regulated, whether the defenders dyke would be injurious. We would have put the question as to their being removable and permanent, or not. We would have put that to the jury, and then asked, does this operation of the defenders do injury or not? That, I have no hesitation in saying, was the proper time for the defenders to have spoken out, and the true and manly way for them to have done. But it is very possible, and I see that referred to, that their adversaries misunderstood the issue as well as the defenders, and that for a time they had the same understanding of it. And I must fairly confess, in looking to the evidence, that there is a sort of evidence allowed here which I cannot comprehend. If the pursuers confine themselves to the point which I think was all that was to be tried, I do not comprehend how a great deal of that evidence for the pursuers was allowed, or how a great deal of the evidence for the defenders was allowed, as to which of the various obstructions does most injury; as to whether Gordon, Baron, and Company's dyke, or the cruive-dykes, and so on, or that of the defenders, does most injury. I cannot conceive how such questions were put; but these are put to the witnesses, and I cannot help thinking that some of the difficulty at least has arisen from the way in which the cause was conducted on both sides. And I am not in the least surprised that Lord Gillies, not being aware of the previous proceedings in this Court, in regard to the question which we wished to have settled, should have taken a different view of the case, and should have been led to conceive that the proper construction of the issue was what he adopted and stated in his charge to the jury; and although, from my knowledge of the case, and of the purpose of the Court when they framed the issue and sent it to be tried, I am compelled to take a different view of it, I am not surprised that Lord Gillies should have formed that opinion. But, my Lords, now that the case is before your Lordships upon the direction of the Judge in the way put in this bill of exceptions, "that the question put in the issue, and the only question they had to consider, was this:—Is the dyke injurious to the pursuers fishings in the actual condition of the river and of other dykes?" and not whether it would be injurious to them if other dykes were demolished or

Don. Nor is any weight due to the alleged finding, that the respondents were not bound to bring any action to remove or

Sept. 7, 1831.

“properly regulated.” I am bound to say, that I cannot hold this to be a due construction of the issues sent for trial. If this question had been put:—Supposing the dyke of Gordon, Baron, and Company to be according to law, and properly regulated, would then that of the defenders be injurious? the direction of the Judge was right. Without being accompanied with these words, I must say that Lord Gillies’s interpretation of the meaning of the issue was never intended by the Court. I had no conception that we were sending, by these issues, a question to the Jury Court which we had already determined in our interlocutor on the relevancy, as to which we had given our opinions, that the circumstances of there being other operations was no ground to bar this action, and that this was an issue on the merits of the cause, but in reference to the question of acquiescence alone.

Such being my opinion, I think it our bounden duty to find, that this exception must be allowed; and as this motion is brought by an exception to the charge of the Judge, the parties may have the benefit of carrying the decision elsewhere, if they are dissatisfied.

Lord Chief Commissioner.—When a Court desires to obtain information by the verdict of a jury for its guidance in deciding a cause, the construction of the issue should be regulated by the object of the Court. It is not going out of the bill of exceptions, (out of which we ought not to travel,) to state the object of the Court, as it is to be collected from that instrument. There it appears that the information which this Court principally required was, whether the obstructions complained of had been acquiesced in. The issues on this point (the third and fourth) have not been tried, nor any verdict found on the acquiescence. The object of the Court has, therefore, miscarried. That miscarriage appears to have arisen out of the construction put by the judge at the trial on the first and second issues; and we must now say whether that construction was erroneous. We must likewise consider the course that may be pursued in the farther progress of this case. Upon this head it is material to observe, that the case does not come here on a motion for a new trial; if it did, the future proceedings would be more simple. If a new trial were granted, founded on the misconstruction of the issue, no proceeding by appeal would have been competent, unless this Court thought it necessary to alter the wording of the issues. Then, upon the analogy of the practice of Courts of Equity in England, (which may with propriety be referred to, as this is part of the machinery of jury trial imported from thence,) an appeal might be competent; but the subject of it would be confined to the single question of, whether the original issues or the amended issues should be sent to trial. But here we have to deal with a bill of exceptions, in which it is competent for the unsuccessful party to carry the case on its merits to the Court of last resort.

Before entering on the construction of the issues, I will endeavour to explain how the difficulties from proceeding by bill of exception may be got over. If this Court allows the exceptions, and the judgment is appealed from, it would be presumptuous to state what opinion the House of Lords might form upon the merits; but it is quite respectful to that House to say, that attention would be paid to the object of this Court in directing the issues, and that the case would not be treated as one in which the rights of the parties were to be decided out and out by the trial of the issues. So that, if the House of Lords should reverse the judgment of this Court, allowing

Sept. 7, 1831. regulate the other obstructions; for there only the question of title was under discussion,—the question of merits was reserved.

the exception, the case would either be sent back to this Court, with directions to frame issues calculated to obtain the object of this Court, or they would take advantage of the clause in the statute 55th Geo. 3, which enables the House of Lords to frame issues, and send them here for trial. But suppose the judgment of this Court not to be appealed from, the future proceedings might be regulated by the act of the 59th of Geo. 3, c. 35, sec. 8, which provides that the Court of Session, if not satisfied with the information which a verdict affords on issues which it sent for their information, may send further issues. The 8th section is regulated by the 15th section of the same act, which prevents an appeal from an order for farther issues. In that event the position in which this case would then stand would be this, that the object of this Court having miscarried, it might send other issues calculated to attain its object, or it might, under the same authority, direct the issues on the acquiescence, which have not been tried, to be tried, and thus attain its end. These views may be useful to the parties in regulating their farther proceedings.

I come now to what may be called the merits of the case, which I approach with all the deference due to the great attainments and eminent talents of the individual who directed the jury at the trial. I have considered the matter again and again, and have looked at it in every respect; but I have not been able to bring my mind to Lord Gillies's understanding of the first and second issues. They arise out of an action of declarator of right, in which there was originally a claim for damages. From that the defender was absolved. In consequence of the judgment absolving from damages, it appears on the face of the issues that no damages are sought, and consequently, that a compensation for pecuniary loss was not the matter to be tried, or one on which a verdict was required. The only question under the first and second issues was, whether the building the dam-dyke, and making the canal, were injurious to the pursuers as proprietors of the salmon fishings. The summons does not limit the injury to loss of fish; it admits of an injury resulting from the act of obstruction. An increase of the number of obstructions is of itself an injury to the proprietors of fishings, as every additional obstruction must be removed in order to obtain a free stream. If there are two, three, or four in existence, and a fifth is erected, all belonging to different proprietors, each is a separate injury, and I do not know how they could all be conveyed as parties in one action. They must be taken up one by one, and the pursuer may select in what order. This, I think, is the legal course of proceeding, and it seems to me to be agreeable to common sense. The dam-dyke and canal complained of impede the free course of salmon to the upper parts of the river, to which free passage for salmon the proprietors have a right. It may be compared to the case of a servitude of a road, across which obstructions are erected. A erects an obstruction which interrupts the way, B. erects a second, an action is brought against A. to get his obstruction removed. He answers, B.'s obstruction does the injury. An action is raised against B., who says, that it is A.'s obstruction which does the injury. Can a person, having a right to a road, be thus deprived of it? or does not common sense and law say, that the party injured is entitled first to deal with the one obstruction, and then with the other, until he gets rid of both? My opinion, therefore, is, that the question is, and in all such cases must be, whether the obstruction complained of is injurious in its nature. And if in this case the obstruction of the defender is one which in its nature is calculated to prevent the passing of

The point, therefore, now before the House, is, simply, whether the issues, as sent, could mean any thing else than an injury, Sept. 7, 1831.

salmon to the upper parts of the river, it is no defence to say, that there are other operations which obstruct as much. The proprietors of the fishings may have a treaty on foot to take those obstructions down, or may proceed by actions for that purpose. An action of declarator is the proper proceeding in such a case ; and such an action is not answered by showing that there are other obstructions greater or equal to that which is complained of.

Upon these grounds I concur in the opinion given by the Lord Chief Justice Clerk upon the merits ; but his Lordship will pardon me if I differ on one point ; I mean as to the frame of the two first issues. I think they are well calculated to obtain the object of the Court ; and they cannot be put so well in any other shape, or be better expressed, viz. whether the canal and dyke are injurious to the pursuers, as proprietors of the salmon fishings. Suppose there are three dykes across a river, constructed according to the Scotch statute, each having the proper central slap in the proper situation ; suppose they all belonged to different proprietors, and that the obstruction is at one time rendered complete by building up all the slaps ; are the proprietors of the fishings deprived of their right of action because the injury is done by three ? In such a case, this, I think, would be the proper issue to try the question ; and I cannot make up my mind to interpreting the issue by the explanatory words which, by the bill of exceptions, appear to have been used at the trial to limit the question to actual damage. Upon the whole, I do not think that the construction put upon the issues at the trial was correct, and I consider it as not to accord with the nature of this case, which is a declarator of right. I am of opinion that if the evidence establishes that the obstructions of the defenders are in their nature injurious to Lord Forbes and the other pursuers, as proprietors of salmon fishings, that the jury should have been directed upon these issues to find a verdict for the pursuers ; the issue being quite sufficient in its form and expression to try the question. I think it right to add, that if this frame of issue were to be deserted I should not know where to resort for an issue to supply its place, without having recourse to issues of specific facts. This may be illustrated by what took place when Gordon, Baron, and Co. had an action with Leys, Masson, and Co. about the dam-dykes. It was in the year 1817, before the general issue was in use. There were nineteen or twenty issues of specific fact proposed, and one of the parties insisted that there ought to be five and twenty. That plan of issues has been long given up, and we ought to be very cautious in shaking the general issue (like the present), which has been found to answer so well. I think the exceptions must be allowed ; but I must add, with reference to what I have stated as to the ulterior proceedings in this case, that it would be extremely desirable that the parties should meet and arrange the further proceedings, so as to avoid the difficulties, the expence, and the delay that may arise out of the pursuers having sought redress by a bill of exceptions. I have said nothing about the extent of the works of the defenders, about their great value, nor about the small value of the fishings ; because these are matters that cannot and ought not to influence the opinion of a Court of Justice.

There is one point which I have omitted. It is said that the pursuers appear to have acquiesced in the construction which the judge put upon the issue at the trial, by not objecting to the evidence given by the defenders as to the other obstructions. It is stated in the bill of exceptions, that the evidence given by the defenders was not

Sept. 7, 1831. having respect to the existing obstructions at the time. The issues are present and positive. The respondents would make

relevant as applicable to the injury done by the other obstructions. It is incorrect to have introduced this into the bill of exceptions, as the sole exception made at the trial was upon the construction of the issue. But with respect to the admissibility of that evidence, I am clearly of opinion, that it was admissible under the issues respecting the acquiescence. It is a strong and important ingredient of proof, to establish acquiescence, that other obstructions already existed; and the defenders were then in the course of going on to prove acquiescence. But though I would have admitted the evidence in that view, I would have required the party adducing it to confine it to the issues as to the acquiescence, and would have prohibited them from using it, or the jury from considering it, as applicable to the two first issues, those on the injury. I cannot, therefore, conclude, that the pursuers acquiesced in the construction of the issue, by not objecting at the time to this evidence, which was admissible when it was given. I consider this case as one of very great importance, both as it relates to the forms of proceedings in this Court in jury causes, and in a general point of view; for if we were to confirm the doctrine which is connected with the construction put at the trial, upon the first and second issues, we should embarrass the rights of parties who have suffered injuries by obstructions, in all cases where more than one act of obstruction has taken place.

Lord Glenlee.—I entirely concur.

Lord Cringletie.—My Lords, I was ordinary in this case; and your Lordship has saved me a great deal of trouble by the very full and accurate manner in which you have gone over the different proceedings. From my interlocutor, embodied in this bill of exceptions, it is perfectly clear what I meant; and I have only to say, that I concur in all that I have heard from the learned judge on my right hand. My Lords, I do go the length of saying, that this issue is a right issue. The question here is, Is this an actual and substantive obstruction? that is the point; Is it, or is it not, a real obstruction? If it is, it does not signify one straw whether there are other obstructions in the river or not. The party is entitled to have it abated. I also concur with what was stated by my learned brother in the conclusion of his opinion, that if the construction of this issue, as stated by my Lord Gillies, be given effect to, no man can maintain his rights to protect himself against encroachments by others.

Farther, I also agree that it was in our power to have sent back new issues, as this did not try the point. Your Lordships will recollect the case of *Watson and Hamilton*, where I was Lord Ordinary. It related to a settlement. Your Lordships sent the case to the jury, and it was tried by a jury, and when it came back to have the verdict applied, your Lordships thought that it was not satisfactory, that it did not contain the information the Court wanted, and they sent it back again to the Jury Court for trial. And, my Lords, if this bill of exceptions had not been before us, I would have been for having the case sent back upon an issue to satisfy the minds and conscience of this Court, and enable it to dispose of the cause and do justice to the parties.

Lord Meadowbank.—My Lords, as the case is already decided, independently of my opinion, it is of the less moment for me to take up the time of the Court. But still, having doubts in my mind, notwithstanding what I have already heard, I consider it to be my duty, as I do entertain doubts, to take this opportunity to express

theirs future, contingent, and dependent for meaning on extra-
neous circumstances. When the suit was instituted, the respon- Sept. 7, 1831.

them. And, in the first place, I am satisfied that the object of the Court in sending this case for trial has not been attained by the issue of the trial and the verdict of the jury. I think that it was the intention of the Court in sending this case to trial to learn whether or not this was an obstruction in the river Don, which, if all the other obstructions were removed, would be detrimental to the rights of the pursuers. In the next place, I have no doubt whatsoever that it was competent for a party having a right of salmon fishing in a river, when there are various obstructions in that river alleged to be injurious to his rights, to select that obstruction with respect to which he means first to complain; I think it is quite within his competency to do so, and I should be very sorry if any proceedings in this Court were to put a party in a situation in which he was not entitled to adopt this course. Upon these matters I have no doubt whatsoever; but, after stating these points, I confess that a difficulty still remains. It is one of form; and therefore, before stating it, I ought to premise, that I agree that, in another shape, the remedy which the pursuers wish to obtain might be attained, and the redress which they ask given; because I have no doubt, when this case came to be considered by your Lordships on the verdict, it would have been competent, and under the 8th section of the statute it would have been in your Lordships' power, to have sent back the case to have the matter tried anew, and the rights of the parties settled in the present action. But, my Lords, that is not the shape in which the case here is before the Court.

It has been brought here upon a bill of exceptions, tendered to the charge of the judge who presided and directed the jury at the trial. Now, in the first place, I understand it to be quite clear that there are two ways in which the remedy now sought may be obtained by the party conceiving himself aggrieved by the result of the trial and the verdict of the jury, at least by which a corresponding remedy may be obtained. It may be obtained by a motion for a new trial, or by means of a bill of exceptions against the charge of the judge. It may be obtained in either of these ways; but these are things totally separate and distinct; so separate, indeed, that, as has been stated more than once to day, the order of your Lordships in the one case is subject to be reviewed by appeal to the House of Lords, while the order of your Lordships in the other is not subject to such review by appeal in any shape whatever. Now this particular case comes before us by a bill of exceptions to the charge of the judge, and on that ground alone; and therefore, as I understand the forms, it was the duty of the presiding judge at the trial to take the issues just as your Lordships sent them to be tried, without looking back to any former proceedings, to ask or inquire what your Lordships meant. I do confess that it is not easy for me to discover how the judge who presided at the trial could give a different direction from what he did give to the jury. I have read these issues over again, and I must say, that, taking them without the explanation given by your Lordships, and attending to the charge of my Lord Gillies, I don't see, looking at the words of the issues, without looking back to the previous proceedings to find out what was the mind and intention of the Court, how it is possible to put a different construction on them from what his Lordship did. I think that the learned judge would have gone out of his duty if he had entered into an inquiry as to what either was or might have been the intentions or views of your Lordships in forming the issues. Having that view of the question, after all I have heard, limited as I am here to the question, as to whether the judge at the trial stated

Sept. 7, 1831. dents maintained that the canal and dyke were injuring the fishings. The appellants answered,—In the existing state of the river the canal and dyke are altogether harmless. The issues in question are, Whether the said canal, cut as aforesaid, is to the injury, &c.—Whether the said dam-dyke, formed as aforesaid, is to the injury, &c. Could any person of common sense and plain perception have directed differently from the judge who presided?

If it were considered competent to institute such an inquiry, there are various grounds and elements for determining that the direction given conveyed the true meaning of the issues, and that the parties had joined issue on the principle that the question of injury was to be tried solely in reference to the existing state of the river, and of the whole obstructions between the fishings and the sea. The respondents failed to show that the other obstructions could be so removed or regulated as to render the canal and dyke injurious, and thus confined the question to the limits put by the judge upon it. Thereby the jury were not precluded from considering the effect of such removal

the import of the issue right or wrong, looking to the express words and terms, and taking the common sense of the words, I do not feel myself entitled to say that it is my opinion that he put a wrong interpretation upon them.

It is simply on that difficulty in point of form that my doubts are rested; for I think the question may be got at in another form; that when it comes back, and your Lordships find that the question has not been tried, which, for the information of the Court, was sent to be tried, your Lordships may, under the eighth section of the statute, remit the cause back to the Jury Court for that purpose. The whole error, I think, has arisen from the Court not stating more distinctly, and expressing more clearly, what was the object they wished to arrive at by having the case tried.

My Lords, I confess I am not much inclined to be actuated in my opinion by the analogies of the law of England, because I do not think, so far as I understand it, that it holds exactly on this case. As I understand, in the Courts of Equity in England, when a case comes before it for further direction, or, on account of an omission, for a new trial, then the Court has the right and the power to send back the cause to the Courts of Common Law for a new trial, in consequence of the object the Court had in view having miscarried. But that is precisely where I think the distinction lies between the powers of the Courts of Equity in England and the Courts here; because we have a bill of exceptions against the misdirection of the judge, and we have also another form, by a motion for a new trial, which is not the way in which the Courts of Equity deal with the matter in England. These are the difficulties that have struck me, and which I have considered it my duty to state to your Lordships.

or regulation; but being furnished with no termini habiles in this particular to proceed upon, the presumption was in favour of the legality of the canal and dyke, and the inference in favour of the appellants incontrovertible. Sept. 7, 1891.

Respondents.—The question raised by the suit in dependence may be regarded as a simple declarator of right. The respondents are entitled to the fishings in the Don. The appellants have cut a canal and erected a dyke, which the respondents alleged injure the fishings. It plainly was of no consequence, in a question with the appellants, whether any or how many other parties had also done or continued to do a similar injury. Issues are framed with the view of bringing out the affirmative or negative of injury; that is, of simple and positive, not relative, injury. The presiding judge directed the jury to have reference to the actual condition of the river and of the other dykes, and even without taking into view its condition in the event of the other dykes being demolished or properly regulated. It is quite manifest that these issues cannot bear the construction whereby they are confined to the existing state of the river. This is made very plain by looking to the summons, defences, and by the interlocutor of Lord Cringletie. Particularly are the condescendence and answer important, as showing that neither the parties nor the Court ever contemplated such a restriction on the meaning; holding, on the contrary, the issues to be without reference to the injury created by the other obstructions.

Lord Chancellor.—What can it signify what was intended? The issues must speak for themselves. We have no concern with what passed before the issue was framed; we are bound by the issue that has been framed. The remit to the Jury Court makes that quite clear. I am bound by what appears on the face of the record; I cannot go to the sources you are desirous of opening.

Serjeant Spankie.—It is not very material for the respondents to press this point, the words of the issue are sufficiently explicit in themselves; but it ought to be remembered, that the issues to the Jury Court are not precisely like the issues in the Common Law Courts of this country; they were rather as issues from Chancery; not sent for final adjudication of the case, but to inform the mind of the Court.

Lord Chancellor.—I have much difficulty on that head. There are

Sept. 7, 1831. certainly wide powers given by the Jury Statute ; but can such issues as these be considered in the light of equity issues, sent merely to satisfy the conscience of the judge ? It would be dangerous to adopt a view which might have the effect of throwing loose the pleadings just begun to be adopted in Scotland ; they are already there too imperfect pleaders,—too ready to plead loosely, and rather require to be kept tight than relieved from strictness.

Serjeant Spankie.—The misdirection is obvious, and as it pervaded the whole case, the verdict cannot stand. The simple way of putting the point to the jury was,—here is an obstruction in a salmon river ; is it enough of itself, and in its own nature, to injure the fishing ? You are not to look up and down the river for obstruction. It is no defence that other parties have done equal or more mischief. But the judge said, it is immaterial to consider any thing else than the present state of the river ? Was this a fair way of reaching the question ? If I raised a mound across a road to a fair, and a party challenged it, what would be thought of my defence if I said, it is of no use to remove my mound, for there is another much worse at a mile distance ? In no view can the direction be supported ; it was a plain misdirection, the remedy for which was, taking the exception now before the House, and which has been sustained by the Court below.

Lord Chancellor.—(2d September 1831). My Lords, although I shall not advise your Lordships at present how to deal with this appeal, yet as I have uniformly made it my practice, as long as I have been in the situation I have now the honour to fill, to make what observations occur to me in presence of the counsel, immediately after hearing their arguments, instead of postponing it to an indefinite period, when counsel may not be present, I shall follow that course upon the present occasion, reserving the final decision of the question until I shall have been able narrowly to inspect the pleadings. I think it is more important that a correct view should be taken (and when taken here should be adhered to) on the subject of these pleadings, than to consider the way in which your Lordships shall ultimately decide this appeal. It has been justly observed that the forms of the pleading in the Jury Court, under the salutary act which regulates its proceedings, are more important, as regulating what follows, than the interests of the parties. The learned serjeant was arguing upon the meaning of the issues, (and that is the only question before your Lordships,) as they appear upon the record, and the direction of the judge as connected with them, and purporting to expound them ; and in order to get at that meaning the learned serjeant was about to have recourse to the previous interlocutor of Lord Cringletie, and that perhaps he had

a right to refer to, although it was given in evidence in a somewhat singular manner; but when he was about further to refer to the preliminary proceedings by way of pleading, and to call the attention of your Lordships to consider the issue that arose, and was framed by the clerk out of them; when he was about to read the condescendence and the answers that were framed to raise the issues, I took leave to stop him, and to suggest that we had no concern with what had passed before the issue was framed, and that we were bound by the issue as the Clerk framed it. The interlocutor of the Court remitted the condescendence (of November 1828) and answers "to the clerks of the Jury Court, to prepare the draft of "an issue or issues fitted for the trial by a jury of the facts therein "alleged and disputed by the parties, to be reported to this Court "quam primum." The clerk, according to the exigency of this order, takes into his consideration, as I apprehend, the condescendence and the answers, asking himself the question, what the facts are that these pleadings show to be disputed by the parties; and out of the facts thus appearing to be disputed he frames, according to the terms of the order, an issue "to be reported to the Court "quam primum," by which I understand that the Court is to exercise its judgment upon the issue so framed, and that the parties, one or other, or both of them, are entitled to object to the frame of the issue, and to call upon the Court to remit it to the Jury Court, or alter the framing of it; at all events it is reported to the Court, and has the sanction of the Court, either expressly by some order adopted, or tacitly by not altering or varying it.

This issue as framed, becomes therefore the order of the Court; and being sent down to be tried by a jury, it is too late—with very great submission I speak to some of the learned judges who appear ultimately to have dealt with this question—it is too late for the Court to say, and it is past all doubt too late for the counsel to contend, that your Lordships, or that the Court, or that Lord Gillies and the Jury who tried the cause, had any thing to do with the condescendence and the answers out of which in point of fact, no doubt, but accidentally, for the purpose of this argument, the issue arose that was so framed. Not only have they nothing to do with them, but it is too late to have to do with them, and they have no business to ask about them. The issue precludes them from saying a word upon what appears in the condescendence and answers, as much as the record of an act, after the bill has become an act, precludes any court of law dealing with an act from looking back to the bill out of which that act arose, or by referring to the speech of the honourable or noble person who may have introduced it, or to their conversation with an individual, by which it might be made to

Sept. 7, 1831.

Sept. 7, 1831. appear, if you could get at it,—which you never can,—that the meaning was so and so, when the only question is, not what he meant, but what the law intends ; in another sense of the word, what the law fixes as the legal meaning of the words which the Legislature, possibly upon his instigation, possibly in spite of his efforts, may have thought fit to use, in framing the law arising out of his bill or proposition. This I think of great importance to be attended to by the Court below,—judges and practitioners. You are as much precluded from going out of the issue framed by the officer, and adopted by the Court, as you are precluded from construing an act by going out of the four corners of the statute, and looking into the bill, or dehors the bill, to gather the meaning. The Legislature only tells its meaning, as a celebrated case has decided, by the enactments in the statute, or after the statute has passed, by a declaratory act affixing the meaning to it ; so much so, that the preamble of a statute, saying, whereas a certain act was passed for such a purpose, has been held to fix no construction upon such act, although it is the declaration of the Legislature that passed them both. The issue in this case has been framed by the clerk of the Court. He may have miscarried as much as you please ; he may have put one fact in issue, when there was another fact to be put in issue ; he may have made it an action for a trespass, instead of an action upon the case ; he may have made it an action for a libel, instead of for an assault ; he may have made the grossest blunder, but you are bound by the issue he has framed as it now stands. I should have been ashamed to have taken up so much time in stating these matters, which are of such ordinary and plain necessity in judicial proceedings in this country, but that I see there is some occasion for recalling them to the attention of the practitioners below, who do not seem to think they are bound by the issue framed. What would be the consequence of this laxity of proceeding ? Precisely that which I suggested to the learned serjeant, who had the good sense and candour immediately to abandon that part of his argument. The consequence would be this : The clerks of the Jury Court may not be, under all the chasteness and strictness of practice and proceeding, the best persons to frame issues. I may have the prejudice of an English lawyer ; but I believe the true way to plead is, that the parties should each frame his portion of the record under the fear arising from the penalty of a demurrer ; that is to say, if he pleads ill he shall pay the penalty of failing at that step of the proceeding. I believe this is the true way of pleading. It may have assumed an appearance of a strict science, with many technicalities, but all the merits of it are derived from that course of proceeding. But be that as it may, the Legislature has said here, that the clerk shall frame

Sept. 7, 1831

the issue, as a master in Chancery in England frames a question to go to a Court of law. Be it so. But how can the clerk ever be expected to perform his important office of a common pleader between the two parties, if he is to have all the while before his eyes such doctrines as seem to have been admitted, again and again, in the course of this case,—that the parties and the Court are not to be bound by what he draws out as the issue, but that they are to gather the meaning from something upon which he proceeded—the condescendence and answers, and the arguments of the Judge in a former stage of the case, which is referred to by the Court. But if the issue is to be the canon obeyed by all, the Court as well as the parties, then the clerk will draw an accurate constat of the question in dispute; whereas if he knows that no such thing is to be the canon, but that every thing else is to be taken into consideration in construing his words, he will do it in the laxest way possible, and parties will have the utmost difficulty in ascertaining the meaning. That I know is but too much the practice in Scotland; irregularity, I may say, is but too regularly pursued; slovenliness is but too carefully followed. I speak from experience in the judicial proceedings in that part of the United Kingdom, and I wish to guard the Court against it. I wish to point out a principle, and state a ground of decision, that shall make it imperative upon them to go strictly to work, to leave nothing to inference, conjecture, and guess, and groping out of the record; and that I can only do by holding them to, and binding them by, whatever they put upon the record. What I have said may not lead very directly to the decision of this question, when your Lordships come to consider more narrowly what is in dispute between the parties; but binding them by the words of the issues, and holding that to be on either side the canon, the question arises, What have we in these words, and what meaning have we to affix to these words; and has the cause miscarried below? I mean, has Lord Gillies affixed a wrong meaning, and tied up the jury from the consideration which was open to them by force of the words of the issue? That is really the question, and the only question before your Lordships. But, before coming to it, I have an observation to make, as some question has been raised whether issues, under the jury act, are to be taken as resembling those which in law we have here, or as in the nature of issues directed out of a court of equity. If they are to be considered like issues directed out of a court of equity, very much of the laxity and slovenliness and imperfection I have been just adverting to will inevitably mix itself up with these Scotch proceedings; for no importance whatever is attached, in practice, to the form of an issue which is sent down from the Court of Chancery. The order here gives authority to the parties

Sept. 7, 1831.

to call upon the judge, and to the judge, whether the parties call upon him or no, to endorse a special matter upon the postea; the consequence is, that many things are tried not to be found in the issues out of the Court of Chancery; the whole question is tried, whether raised by the issue or not. I therefore do most anxiously hope that I shall find no such thing in these jury acts, or in the practice of the Court of Session, as a sanction for the proposition, a perilous proposition as regards the strictness of proceeding, that these issues are to be taken rather as issues out of Chancery. I see nothing whatever in this case, or in the act, to sanction that doctrine; and as at present advised, I shall take it that you are bound completely here by the issue framed by the officer of the Court, directed by the order of the Court, and sanctioned by the approval of the Court. This is the first issue: "Whether the said canal, cut as "aforesaid, is to the injury and damage of the pursuers, or of any and "which of them, as proprietors of salmon fishings in the said river." The second is like the first: "Whether the said dam-dyke, formed "as aforesaid," (instead of whether the said canal, cut as aforesaid,) "is to the injury and damage of the pursuers, or of any and which of "them, as proprietors of salmon fishings in the said river." Lord Gillies confines this to the existing state of things. Now, as I have said before, I shall look into the pleadings with great anxiety before I advise your Lordships to come to a final decision as to the rights of the parties, and the general question, as to the mode of proceeding in Scotland; but, as at present advised upon the argument, and the view of the record itself, I consider it to be plain enough that the only restriction which is here by force of these words affixed to the generality of the question, is the two-fold restriction—"cut as aforesaid," and "as proprietors of salmon fishings in the said river," and that those are the only two parts of these two issues that can be said to bear any reference to the existing state of things. Now, how do these bear reference to the existing state of things? "Cut "as aforesaid" means only a canal cut in the given line and of the given dimensions; it does not mean cut in such a way that there is one obstruction above and another below. It is not, therefore, to be read as if it were, cut in all the circumstances of the river, as they actually stand; that would be a forced and violent construction to put upon the words; but "cut as aforesaid" simply indicates the manner in which the canal is cut. As to "the injury and damage of the "pursuers," that is quite clear; and then as to the words, "or of any "and which of them, as proprietors of salmon fishings in the said "river;" does that limit it in any way to the present existing state of the river? Does it not let in all the considerations, and all the rights and equities of these parties, in whatever way you look into

Sept. 7, 1831.

them, whether in the potential or in any other sense, with regard to those salmon fishings? I incline to think it does. But Lord Gillies does not take the same view of the subject. He imports, if his words have any meaning, a plain and manifest and intelligible qualification and restriction into the words, the generality of which, in my opinion, is undoubted. He says, "Is the dyke injurious to the pursuers fishings"—that I have no objection to—"in the actual state of the river and of other dykes?" I want to know what warrant there is, in the issue framed by the clerk, in the strictest sense of these words, "whether the canal, cut as aforesaid, is to the injury and damage of the pursuers, or of any and which of them, as proprietors of salmon fishings" for importing these words, "in the actual state of the river and of other dykes." It may be fit and proper that the actual state of the river and other dykes should be taken into the account; but this does more than allow the jury to take it into account; it directs the jury to confine themselves to the actual state of the river and the other dykes; it says, that the jury are only to consider whether the dyke is injurious to the pursuers fishings in the actual state of the river and the other dykes, and not whether it would be injurious to them if other dykes were demolished or properly regulated; and then comes the exception which is taken, that the question which the jury had to consider was, "Whether the said canal and dam-dyke of the said defenders were injurious to the fishings of the said pursuers, without reference to the injury occasioned by the other obstructions in the river." And farther, that as the cruive-dyke might be regulated, at all times, in terms of law, and that as the other dykes, in so far as they were encroachments injurious to the fishings of the said pursuers, might be removed or properly regulated, and as the trial between the parties did not depend on the objections or defences, in regard to any other obstructions, the evidence led, with regard to the effects of the other obstructions on the river, was irrelevant, and that the injury occasioned by them, in their present state, to the fishings of the pursuers, ought not to be taken into the consideration of the jury, in returning their verdict on the said issues." The ground of exception taken to the direction of Lord Gillies is, that he left to the jury the question, whether there was or was not injury from the dyke to the pursuers, in the actual state of the river and of other dykes. If Lord Gillies did not use these words, if that was not the way in which he left the question to the jury, he ought not to have signed this bill of exceptions which he has signed, because it appears clearly and undeniably by it that he used those words in addressing the jury; and the objection to it is, that it was so put, and that they were told that the question was not,

Sept. 7, 1831.

whether it would be injurious to them if other dykes were demolished or properly regulated. But here arises a difficulty, and it is pretty nearly the only difficulty. If we are to approve of the bill of exceptions altogether, I doubt whether we must not go a little farther than saying Lord Gillies was wrong, and admit that the bill of exceptions is right in saying what should have been the form in which Lord Gillies ought to have presented the question to the jury; for that is the complaint—not only that Lord Gillies said so and so, but that he did not say that which ought to have been his direction, and which it is contended was the only question to be left to the jury. The exception would have been much better framed if it had simply objected to the form in which Lord Gillies presented the question to the jury, and not contained the form in which they say it ought to have been presented to the jury; because it may happen that Lord Gillies was wrong, and then the exception will hold; but it may be that the parties likewise were wrong; it may be that the way he put it was not right, but that the way in which they put it may not be right either. I think the Court was left in a difficult alternative, in not being satisfied with the object of the bill of exceptions, or that what was said was what ought to have been said. But the Chief Commissioner adopts a very wide and lax construction, in my opinion, and much more so than is safe to indulge in, as to what is the function of a judge directing a jury in any issue framed by the Court, and sent to him.

My Lords, I have stated thus much to show your Lordships the view I take at present of the pleadings in this case. I intend to look more narrowly into them before I advise your Lordships to give judgment; but I thought it fit to state in the presence of the counsel what I have done, and nothing I am likely to hear further will alter my opinion upon that. I may think, that the Court of Session have the power of originating an issue by the express provisions of the statute, and of sending an issue back, if they are not satisfied. The Chief Commissioner argues upon that, and says, if the Court had granted a new trial on ground of misconstruction, they might have sent another issue to try the question; but what I wish to impress upon your Lordships, and the Court below, and the practitioner, is, that unless the Court of Session mean to send an issue in the nature of an issue out of the Court of Chancery or Exchequer here,—if it is a common issue, framed in the ordinary way,—it must be framed to be binding, and it must be held that the words of the issue are to be the canon of the parties and the judge; otherwise you are trying nothing before the jury; you do not know what you are arguing about, or directing your evidence to; and, among other inconveniences, this would be one of the worst, that the very issue before the

jury will lead to a preliminary argument before and a decision by the judge as to the meaning of the issue the jury have to try ; a proceeding utterly indecorous and wasteful of the time of the Court. Sept. 7, 1891.

Attorney-General.—Will your Lordships allow me to make one observation ?

Lord Chancellor.—Certainly ; I rather court it.

Attorney-General.—Supposing the enlarged power which your Lordship alluded to to be in the Court of Session—

Lord Chancellor.—If you look at the appellants' case, to the notes of the Chief Commissioner's speech, you will find the 8th section of the jury act is alluded to, which, he says, provides " that the Court of Session, if not satisfied with the information which a verdict affords on issues which it sent for their information, may send further issues." That cannot be done, as you know very well, by the Court of King's Bench ; they cannot be dissatisfied, like the Court of Chancery, upon an issue which it directs.

Attorney-General.—Though the Court of Chancery possesses that great power, if, under an issue drawn up and directed by the Court of Chancery, any indorsement was sought for by either party, the parties would be as much bound.

Lord Chancellor.—Yes ; the parties would be bound, but not the Court. The judge may indorse special matter upon the postea, though the parties do not wish him. If the parties do not call upon the judge to indorse the finding, it binds the parties. But the Court may afterwards say, its conscience is not satisfied with this finding, and, though you do not ask it, I will send it back again ; and that is done every day. But the fact is, that issues in Chancery are quite for a different purpose ; they are directed to inform the conscience of the judge ; the Court is not bound by the result ; and it may at any period decide in the teeth of the finding.

Attorney-General.—Just so, my Lord.

It is declared, by the Lords Spiritual and Temporal in Parliament assembled, That the meaning and intention of the issues directed in this case were, to raise the question, whether the canal and dam-dyke of the appellants are, or are not, injurious to the respondents' fishings, as well in the actual state of the river, as after, by lawful means, that state shall be changed by the removal or regulation of other dykes in the river Don in the proceedings mentioned, so that the questions in the issues must be answered in the affirmative if the jury find, either that there is now any injury in the actual state, or that there would be injury in the state so altered, or that the canal and dyke are or would be

Sept. 7, 1831. injurious in both states of the river: And, with this declaration, it is ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby affirmed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to proceed farther therein as shall be consistent with this judgment, and as shall be just.

Appellants' Authorities. — 3 Ersk. 9, 13; Glasgow Waterworks, Dec. 20, 1814; Colville, May 27, 1817; Charity v. Riddel, July 5, 1808.

Respondents' Authorities.—Stat. 1477, c. 73, 1489, c. 14; Scott, July 16, 1742 (14,264); Grant, Jan. 17, 1777; Supp. Vol. v. 447; Fraser, March 4, 1766 (10,742.)

RICHARDSON and CONNELL,—SPOTTISWOODE and ROBERTSON,
—Solicitors.

No. 31.

JOHN CALDER, Appellant.—*Lushington.*

GEORGE AITCHISON and Co., Respondents.—*John Campbell—Sandford.*

Proof—Cautioner.—When a party bound himself “to guarantee an agent for four per cent. for commission and guarantee,”—held (affirming the judgment of the Court of Session), first, that this merely imported an obligation to guarantee the payment of the price for which goods sent to the agent should be sold, and not for his faithful conduct; and, second, that evidence of mercantile men was inadmissible to prove, that in practice the words comprehended an obligation to the latter effect.

Sept. 10, 1831.

1st Division.
Jury Court.

CALDER, a merchant in Leith, raised an action in the Court of Session against George Aitchison and Co., also merchants there, setting forth, that in the month of September 1820 he consigned to them 700 barrels crown-brand white herrings, for the purpose of being forwarded to and sold by their agents at Königsberg; the said George Aitchison and Co. being to receive four per cent. on the amount sales of said consignment, for commission and guarantee.

“That the pursuer, as well as the said George Aitchison and Company, considered said herrings to be worth at least 23s. per barrel, which was the sum at which they were insured: That in terms of their agreement, the said George Aitchison

Sept. 10, 1831.

“ and Company made an advance to the pursuer on said consign-
“ ment of 16s. per barrel, being about two thirds of the esti-
“ mated value, by payment of 60*l.* sterling in cash, and a bill for
“ 500*l.* at three months’ date: That said herrings were shipped
“ at Fraserburgh on board the *Chance of Largo*, Smith
“ master, in the beginning of October 1820, and the vessel
“ proceeded on her voyage on or about the 7th of that month:
“ That the first communication the pursuer received from
“ Aitchison and Company, after the herrings were shipped, was
“ on 1st December following, when he was informed by them
“ that, according to advices they had received from their agents
“ at Königsberg, the prices of herrings were very much depressed
“ in that market: That in consequence of this communication
“ the pursuer immediately addressed a letter to Aitchison and
“ Company in these terms:—‘Leith, 1st December 1820.—
“ Sirs, I have yours, informing me of the low state of the
“ herring market at Königsberg. I have to beg the favour of
“ you not to allow any of my cargo to be sold under twenty-
“ eight florins per barrel. I am of opinion that the
“ Messrs. Borthwicks are reducing their prices in order to
“ run the herrings in other hands out of the market, so that
“ they may get the whole of it to themselves, and they will
“ improve in the spring. Your attention to this will oblige,’
“ &c.: That on receipt of said letter, Aitchison and Company
“ sent their clerk to the pursuer to inform him that they would
“ agree to its terms, provided he would grant them his accept-
“ ance for 500*l.* at three months, to enable them to hold the
“ herrings till the markets reached the specified price, and to
“ prevent them from being losers in the transaction: That the
“ pursuer, on the 2d day of December 1820, accordingly,
“ granted his acceptance to the said George Aitchison and
“ Company, payable at three months, for 500*l.*, which was
“ agreed to be renewed should the markets not have attained
“ the price put upon the herrings by the pursuer at the time
“ it fell due: That in violation of said understanding and agree-
“ ment, the said George Aitchison and Company, without
“ informing or consulting the pursuer, first wrote to their agents
“ at Königsberg to dispose of the herrings on arrival at the
“ best price the market would afford, and afterwards, on the
“ 21st day of October 1820, to dispose of the herrings, pro-

Sept. 10, 1831. " vided they could nett about 18s. per barrel for them: That
 " said herrings, according to account sales furnished to the pur-
 " suer, were, without his knowledge or authority, sold at a
 " mere trifle: That had the said George Aitchison and Com-
 " pany acted properly, the pursuer would have obtained full
 " value for his goods, because herrings rose at Königsberg in
 " spring to a price which afforded 29s. per barrel, after paying
 " all expenses."

He therefore concluded for 915*l.* 3*s.* 1*d.*, or such other sum as the herrings would have brought had they not been improperly sold.

In defence, Aitchison and Co. pleaded—first, that they and their agent had acted in terms of the agreement, and the herrings had been sold at the best price which could be obtained in the market; and, second, that according to mercantile practice they had a right to dispose of them as they judged best for repayment of their advances. An issue was then sent to a jury in these terms:—

" It being admitted, that in the month of September 1820
 " the pursuer consigned to the defenders, in terms of a letter
 " from the pursuer to the defenders, dated 12th September
 " 1820, 700 barrels crown-brand white herrings, for the purpose
 " of being forwarded to Königsberg, and there sold,—Whether
 " the defenders failed to perform their duty as commission
 " agents, in regard to the disposal of the said herrings, to the
 " loss, injury, and damage of the pursuer?"

The jury returned this verdict,—

" Find for the pursuer, and assess the damages at the dif-
 " ference between the net sum realized and the net price of
 " eighteen shillings per barrel on each barrel consigned, free
 " of all charges at Leith."

A new trial was thereafter granted on payment of costs by Aitchison and Co., and the same issue sent to a special jury.*

The case was tried before the Lord President and the Lord Chief Commissioner; and, among other evidence, Calder gave in the following letters as constituting the agreement between the parties:—" Messrs. George Aitchison and Co.—Gentlemen, I

* A special jury in Scotland is not a jury of merchants.

“ beg to consign to you 550 barrels white herrings, which I Sept. 10, 1831.
 “ request you will get forwarded to Königsberg, and to be sold
 “ there on arrival by your agent, at the best price the market
 “ will afford ; and I hereby also authorize you to freight the brig
 “ Chance of Largo, Captain Thomas Smith, to carry said cargo,
 “ at the rate of 3s. per barrel in full. I have to request that
 “ you will order the same to be insured at 21s. per barrel, say
 “ 577*l.* 10s. sterling on the whole, it being understood that you
 “ are to advance me at the rate of 16s. per barrel on the quan-
 “ tity shipped, agreeably to what your Mr. Aitchison mentioned ;
 “ and farther, that you are to guarantee your agent at Königs-
 “ berg, on being paid at the rate of four per cent. for commis-
 “ sion and guarantee.” (Signed) “ John Calder. P. S.—In-
 “ sure at 23s. instead of 21s.” (Signed) “ J. C.”—“ Mr. John
 “ Calder, Leith. Sir,—We have yours of this date, consigning
 “ to us 550 barrels white herrings, to be forwarded to Königs-
 “ berg, and to be there sold on your account by our agent ;
 “ also authorizing us to freight the brig Chance to carry the
 “ same, at the rate of 3s. sterling per barrel in full, and to get
 “ them insured at the value of 21s. per barrel, on condition of
 “ our advancing you 16s. sterling per barrel on the quantity
 “ shipped, and guaranteeing our agent at Königsberg, and for
 “ which we are to receive four per cent. on the amount of sales
 “ for commission and guarantee. To this we hereby agree.
 “ (Signed) P. pro Geo. Aitchison and Co. Thos. A. Shand.
 “ P. S.—Your advances will be paid on handing us bill of lading
 “ indorsed.”

In reference to these documents (as stated in the bill of excep-
 tions), “ the counsel for the pursuer, in further maintenance of
 “ the said issue, did propose, and offer to give in evidence, by
 “ William Connal, an extensive commission agent in the city of
 “ Glasgow, and by other merchants of extensive dealings and
 “ well acquainted with the usage of trade, what they understood
 “ to be the effect and import of the undertaking in the said mis-
 “ sives or letters of the 12th September 1820, given in evidence
 “ as aforesaid, in which the defenders stipulated to guarantee
 “ their agent at Königsberg, upon condition of being paid at the
 “ rate of four per cent. for commission and guarantee ; and that
 “ the guarantee contained in said letters is understood by mer-
 “ chants to amount to an engagement, upon the part of the persons

Sept. 10, 1831. “ so undertaking, to be responsible that their said agent should
“ act in conformity to the instructions he received, and that they
“ were responsible for his deviating from those instructions, or
“ committing any breach of his duty as agent, in selling the goods
“ consigned at a lower price than he was directed, or below the
“ market price at the time, or in a manner injurious to the
“ owner of said cargo. Whereupon the defender’s counsel,
“ learned in the law, objected that the evidence of merchants to
“ prove their understanding of the obligation undertaken for the
“ agent in a foreign country, by those missives, is not admissible;
“ that the construction of the letters was a question of law for the
“ Court, and that it is incompetent to ask any merchants or
“ other witnesses what their understanding of the meaning of the
“ letters is; and the said Lord President and Lord Chief Com-
“ missioner did then and there declare it to be their opinion,
“ that such evidence of merchants was inadmissible. Where-
“ upon the counsel for the said pursuer did then and there insist
“ before the said Lord President and Lord Chief Commissioner,
“ that the said several matters so proposed to be given in evidence
“ by the counsel for the pursuer were admissible, and ought to
“ have been received, and did tender their exceptions to the
“ opinion so given by the said Judges. The counsel for the pur-
“ suer here closed their case; and the counsel for the defenders
“ did then insist that the Court should direct the jury to find a
“ verdict for the defenders; and did contend, that in sound con-
“ struction of said letters of 12th September 1820, the defenders
“ did not incur an obligation to guarantee their agent at Konigs-
“ berg, as contended for on the part of the pursuer; but the
“ undertaking or guarantee is no more than what is known in
“ law as an obligation del credere, that is to say, an obligation
“ to make good the sum or sums for which the goods might be
“ sold; and that no farther obligation was undertaken on the
“ part of the defenders, on account of their agent, other than that
“ they should employ a person of ordinary skill and good cha-
“ racter. But the counsel for the pursuer did contend that the
“ defenders were bound by law, and by their special undertaking
“ by their said letter-missive, to indemnify the pursuer for the
“ loss he had sustained by the misconduct of the defenders’ agent
“ at Konigsberg; and that the jury ought to be directed to find
“ a verdict for the pursuer, and to assess the damages. But the

“ said Judges did give it as their opinion, that the letter-missive Sept. 10, 1831.
 “ did not in law, nor according to the true meaning of the said
 “ letter, create any obligation on the defenders, other than that
 “ which was contended for by their counsel as aforesaid ; and the
 “ said Judges did accordingly direct the jury to find a verdict for
 “ the defenders, and the jury did then and there deliver their
 “ verdict for the defenders. Whereupon the counsel for the
 “ pursuer did tender their exception to the said direction, and
 “ did insist,—1st, that the jury ought to have been directed to
 “ take into their consideration the missives and other evidence
 “ laid before them, and that the construction of the terms thereof,
 “ being such as are in use amongst merchants, should have been
 “ left to the jury to find according to their understanding of the
 “ same ; and if they were of opinion that damage had arisen
 “ from the defenders’ agent having failed to obey his instructions,
 “ or perform the other duties for which the defenders, according
 “ to the understanding of merchants, had made themselves re-
 “ sponsible, they should assess damage, and find a verdict for the
 “ pursuer ; 2d, that if the Court did not leave the construction
 “ of the terms used to the jury, they ought to have directed, that
 “ the obligation undertaken by the defenders was not by law
 “ merely of the nature of a *del credere* commission upon sales
 “ made by the agent, but amounted to a guarantee of the conduct
 “ of the agent generally, and, being for a valuable consideration,
 “ made the person undertaking the said guarantee liable to
 “ answer that the agent should obey the instructions sent him,
 “ and perform his duty in other respects ; and that if they were
 “ of opinion that it had been proved that the defenders’ agents
 “ had not obeyed their instructions or performed their duty,
 “ they ought to assess the damages, and find a verdict for the
 “ pursuer.”

The jury having found for the defenders, the pursuer tendered a bill of exceptions. The Court (28th June 1831) disallowed it, assolizied the defenders, and found them entitled to expenses.*

Calder appealed.

* 9 Shaw and Dunlop, 777.

Sept. 10, 1831.

When his counsel opened the case,

The *Lord Chancellor* observed,—Can you say that a witness is to be examined upon the construction of an instrument, and put in the place of the Judge and the jury? It would have been very doubtful whether he ought to have given you the usage of the trade to explain so plain a letter as this; it is a guarantee of payment; it is the solvency that is guaranteed. I think it is a short case indeed.

Dr. Lushington.—If that is your Lordship's impression, it would be in vain for me to trouble you further.

Lord Chancellor.—Yes; it is a plain *del credere*. You and Mr. Campbell must be both aware, that in mercantile cases—not in other cases—the learned Judges have regretted they have gone so far as putting a letter into the hands of a witness, and saying, What does it mean? The appeal must be dismissed, and with 100*l.* costs. Really the Jury Court will become a nuisance, if parties are to bring bills of exception like this. I never saw words more strongly importing *del credere*.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of affirmed, with 100*l.* costs.

Appellant's Authorities.—*Lucas v. Groning*, 7 Taunton, 164; *Smith v. Blandy*, 1 Ryan & Moodie, 260; *Philips' Law of Evidence*, vol. i. 566; *Bell's Principles of the Law of Scotland*, 127; *Thornton v. Royal Exchange Assurance Co.*, Peak, 25; 1 Vesey, 459; *Doe v. Martin*, 4 T. R. 66; *Hood v. Cochrane*, Jan. 1818, (F. C.)

SYDNEY S. BELL—RICHARDSON and CONNELL,—Solicitors.

No. 32.

JAMES SCOTT (Lord ELIBANK's Trustee), Appellant.—
Mr. Serjeant Spankie—Mr. Rutherford.

JOHN ALLNUTT, Respondent.—*Mr. Hayes.*

Heritable and Moveable—Foreign.—Where part of an entailed estate was sold for redemption of the land tax, and the surplus price lodged in bank, and thereafter lent out on heritable security by the statutory trustees, and the heir apparent under the entail, during the life of the heir in possession, for onerous causes, executed in England an assignation in the English form of his right to draw the

interest thereof during his life, and after his succession granted a general disposition of all his property to a trustee for behoof of his creditors, with a special disposition of his life interest in the entailed estate on which the trustee was infeft:—Held, in a competition for the interest of the surplus price (affirming the judgment of the Court of Session), that the right to draw it was carried by the assignation, and could not be defeated by the subsequent disposition to the trustee.

By the statute 42 Geo. III. c. 116. for redemption of the land tax on entailed estates, it is provided that the price of the lands sold for that purpose shall be paid to a trustee (to be appointed by the Court of Session), who shall “find security to their satisfaction that the sum or sums of money to be paid to him by the said purchaser or purchasers shall be duly and faithfully applied in the manner and for the purposes herein-after directed.” The trustee is appointed to invest the whole price in the public funds; and after transferring what is sufficient for the redemption of the land tax, it is directed, that when there is any surplus “such surplus stock may be sold, and the money arising therefrom be paid into or placed in one or other of the two public banks of Scotland, with the previous authority of the Court of Session,” who are required to authorize this money to be employed, “as soon as conveniently may be,” either in payment of debts affecting the entailed estate, or in the purchase of other lands to be entailed in the same manner, “and in the meantime, till the said surplus money or balance shall be so employed, to order and direct the money to be laid out upon such security as to the Court shall seem proper,” so that it shall be “effectual to secure to the person or persons who would for the time have been entitled to the rents or profits of the said manors, messuages, lands, &c., in case such sale, &c. had not been made, and the succeeding heirs of entail who shall respectively come to the possession of the same, the enjoyment of the interest of the said money, and to preserve the capital until the money shall be employed as aforesaid.”

Sept. 10, 1831.

2D DIVISION.

Ld. Mackenzie.

Under authority of this statute, the late Lord Elibank, in 1806, sold the farm of Redhouse, part of the entailed estate of Ballencrieff. Of the price, after redeeming the land tax, there was a surplus of 10,600*l.*, which was, in terms of the act, paid into the royal bank of Scotland by the statutory trustees, and was afterwards, by authority of the Court of Session, lent out

Sept. 10, 1831. on heritable security, the bonds and infestment being taken in favour of these trustees. The greater part of it was lent to the late Sir John Lowther Johnstone. In 1816, and while it continued so vested on heritable security, the present Lord Elibank, then Alexander Murray, executed in England, in favour of John Allnutt, a domiciled Englishman, a deed according to the forms of the law of England, whereby, for a certain sum of money paid by John Allnutt, he “bargained, sold, assigned, disposed of, and “set over” all that the life estate, right, or interest, and all other the estate, right, or interest to which the said Alexander Murray, as the next heir of entail in succession after the said Alexander Lord Elibank under the aforesaid deed of entail, is entitled in reversion or remainder expectant on the decease of the said Alexander Lord Elibank, in his lifetime, and to the foresaid annual rent of 530*l.* 19*s.* to be uplifted, &c., or such other annual rent or rents, interest, income, or produce corresponding to the principal sum of 10,600*l.*, or the securities whereon it should be lent for the time, to be held for his use and benefit, with power to him, “as the attorney” of Alexander Murray, or otherwise, to demand, sue for, and recover the interest of the above principal sum, and to grant effectual discharges for the same. This assignation was intimated to the statutory trustees on the 9th of December thereafter.

On the death of Alexander Lord Elibank, in September 1820, Sir John Lowther Johnstone’s trustees (he being now dead) insisted on retaining the interest against the statutory trustees, in compensation of a personal debt due to them by the present Lord Elibank; but in a multiple-pounding raised by the trustees, in which claims were lodged by the trustees of Sir John Lowther Johnstone and by John Allnutt, the latter was preferred by an interlocutor of the Lord Ordinary pronounced in 1823, which was acquiesced in. Thereafter, in 1824, Lord Elibank granted in favour of James Scott, accountant in Edinburgh, a general trust disposition for behoof of his creditors, and payment to himself of such yearly sums as his creditors might allow of all his property, and all rights belonging to him, or that might belong to him, with an obligation to execute special conveyances, if necessary; but under this declaration, “that his trust right shall not be understood or interpreted to “prefer any creditor or set of creditors to another, or postpone

“ or annul the securities or diligence of any creditors already
 “ done or acquired ; but their preferences among themselves shall
 “ remain entire, and in the same situation in every respect as
 “ they stood before the execution of the trust deed.” Sept. 10, 1831.

Shortly, thereafter, Lord Elibank, in implement of his obligation to grant a special conveyance, executed an *ex facie* absolute disposition of the entailed estate of Ballencrieff, to subsist during his Lordship's life ; and on this disposition James Scott was infest, granting at the same time a back bond declaratory of its being only in trust, and of the purposes for which the trust was granted. Scott intimated this deed to the statutory trustees on the 11th of March 1824, and insisted that he was entitled to the interest of the surplus price of the land sold for redemption of the land tax. In order to have his right ascertained, he raised, in name of the statutory trustees, a process of multiple-poining, in which claims were lodged for him and for Allnutt under his deed of assignation.

The Lord Ordinary found, “ That the claim of Mr. John
 “ Allnutt is preferable upon the interests arising from the sum
 “ of 10,600*l.* libelled, in so far as the said interests are in medio
 “ in this process.” His Lordship at the same time issued the subjoined note of his opinion.*

* “ The assignment of Allnutt seems sufficient as an assignation of the interests
 “ payable to Lord Elibank by the trustees, and rents of lands to be purchased by
 “ them. The Lord Ordinary thinks the intimation to the trustees sufficient, so far
 “ as relates to interests, even before the succession of the present Lord Elibank, and
 “ the after proceedings likewise seem equivalent to intimation to the trustees. The
 “ Lord Ordinary does not think that an assignation of interests or rents needs to be
 “ intimated every term. Holding this, then, the Lord Ordinary sees no further
 “ question in respect to the interests which accrued before the conveyance to Mr. Scott.
 “ In respect to the interests accruing after that conveyance, the Lord Ordinary thinks,
 “ that if Lord Elibank had voluntarily made a conveyance to his creditors, evacuating
 “ the right he had previously for value granted to Allnutt, this would have been very
 “ wrong ; but the Lord Ordinary is satisfied his Lordship neither intended to do nor
 “ has done this. The proviso in the general disposition seems sufficient to exclude
 “ this. If the assignation of interests, &c. to Allnutt had been in security of a debt,
 “ this proviso clause must expressly have supported it against being cut down by the
 “ conveyance to Scott, and in fair interpretation the Lord Ordinary thinks the
 “ clause must equally support the actual assignation to Allnutt, though it gave him
 “ right to the interest, &c. directly. But further, the Lord Ordinary does not think
 “ that, in the circumstances of this case, there was room for evacuating Allnutt's
 “ assignation to the interests by any right that Lord Elibank did, or indeed could at

Sept. 10, 1831. Scott reclaimed, but the Court, on Nov. 16, 1827, adhered *, and thereafter the Lord Ordinary decerned for a specific sum in favour of Allnutt.

Scott appealed.

Appellant.—1. As the lands were sold for redemption of the land tax, the surplus price must still be considered as part of the entailed estate, and must therefore fall under the disposition to him of the lands of Ballencrieff. This being feudal, and followed by infestment, is preferable to an assignation, unless the fund be held moveable. But it cannot be regarded as moveable; although converted into money vi statuti, it is truly real property, both in its own nature as part of, or a temporary surrogatum for, a portion of the entailed estate, and also in respect of its destination to the heirs of entail, and the object for which it was held, viz. the purchase of lands; consequently it could not be affected by a deed in the English form, which was confessedly ineffectual to convey Scotch heritage. Besides, at the date of the assignation to Allnutt, the fund was actually invested heritably; and although rights under a trust deed may be considered moveable where the trustees hold the trust estate for the purpose of selling land, this can never be so as to

“ this time grant. The Lord Ordinary understands that an assignation of rents may
 “ be evacuated by a disposition and infestment in the lands yielding the rents granted
 “ to a third party; and perhaps this may hold even in the case of a disposition and
 “ infestment granted by and limited to the life of an heir of entail, though that seems
 “ open to some question. But here there were, in relation to the present question,
 “ no lands for Lord Elibank to dispoise, or Mr. Scott to take infestment in. The
 “ lands of Redhouse had been sold, and the price was vested in judicial trustees, who
 “ held for the purposes; first, of paying the interest to Lord Elibank till land
 “ was acquired; second, of vesting the capital in land to be taken to the series of heirs
 “ of entail and under the entail. Now, as to the later purpose, it does not appear to
 “ the Lord Ordinary that Lord Elibank could convey over any right to Mr. Scott,
 “ or to any body. The duty of the trustees still appears to remain unchanged in that
 “ respect. They must convey the lands, not to Mr. Scott, but to the heirs of entail.
 “ In respect of the former, the purpose of the trust was already qualified by the assign-
 “ nation of the interests to Allnutt, and intimation thereof to the trustees, which
 “ made it the duty of the trustees to pay those interests to Allnutt, not to Lord Eli-
 “ bank; and after that, Lord Elibank could not dispoise to Mr. Scott any right to
 “ these interests.”

* 6 Shaw and Dunlop, 62.

a fund actually heritable at the time, and vested in them for the purpose of purchasing lands. Sept. 10, 1831.

Respondent.—On the supposition that the fund is moveable,—and there can be no doubt that it was capable of transmission by assignation and intimation—but the fund, or at least the interest, does not form part of the entailed estate—it was not even in the heir of entail for the time being, but was separated from the estate by statute, and held by trustees for special purposes, the heir having nothing farther under the statute than a right to the interest accruing therefrom. Lord Elibank, therefore, did not convey this fund with the lands of Ballencrieff to the appellant. Besides, having previously conveyed to the respondent his right to draw the interest of it during his life, he cannot be presumed to intend—and it was clear from the terms of the general disposition that he did not intend—to convey to the appellant what he had previously conveyed to another. The fund in question, being actually money, cannot be regarded as heritable *suâ naturâ*; it is necessarily moveable; and even as to rights heritable *destinatione* merely, they can be transferred by deeds not probative by the law of Scotland, if in the legal form according to the country where they were executed. It is only immoveable on proper territorial subjects, which require to be transferred by deeds, and executed according to the law of the territory; and, at all events, the right possessed by the heir of entail, under the statute (which must regulate the nature of it), of drawing the interest of this money, was a moveable right transferable by assignatur. The manner in which the fund was employed by the trustees for security could not alter its real character under the statute; besides, the respondent's right was ascertained and fixed by the decision in 1823.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of be affirmed.

Appellant's Authorities.—42 Geo. 3. c. 116, sec. 63, 65, 101; Ewing, Nov. 29, 1752 (5476); Wilson, May 31, 1809 (76); Angus, Dec. 6, 1825 4 S. & D. 279; Kyle's Trustees, Nov. 14, 1827 (6 S. & D. 41); 3 Ersk. 2, sec. 10, 11, 12, 13, 14; Tait on Evidence, 57, 83, 88, 90; Voet, T. 1. L. 1. t. 4; 2 Ersk. 3, 39,

40; 2, 3; Earl of Dalkeith, Feb. 1729 (4464); Crawford, Jan. 14, 1774 (4486); Durie, Nov. 30, 1791 (4624); Ross, July 4, 1809 (F. C.); Bedwell and Yates, Dec. 2, 1819 (F. C.)

Respondent's Authorities.—3 Ersk. 2, 40; 8, 17; Falconer, Dec. 11, 1627 (4501 & 5465); Sinclair, July 16, 1636 (4501); Erskines, Dec. 15, 1664, and Scott, Nov. 28, 1676 (4502); 3 Ersk. 8, 20; Grierson, Feb. 25, 1780 (7591); Douglass, June 29, 1796 (1623); Ersk. B. 3, tit. 5; Turnbull, June 12, 1751 (871); 3 Ersk. 5, 4.

MACDOUGALL and CALENDER,—CURRIE, HORNE, and WOODGATE,—Solicitors.

No. 33. MURDO MACKENZIE of Ardross, Appellant.—*Mr. Serjeant Spankie—Dr. Lushington.*

THOMAS HOUSTON of Creich, Respondent.—*Lord Advocate (Jeffrey)—Mr. A. McNeill.*

Title to pursue—Jus Tertii—Salmon Fishing—Process. A party having brought an action, libelling that he was tacksman of the whole salmon fishings in a firth, and proprietor of other fishings incertain rivers flowing into it, against a proprietor of lands situated on the firth, to have it found that the defender had no right to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing either in tack or property:—Held (affirming the judgment of the Court of Session) 1st. That although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and 2d. That the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender.

Aug. 13, 1831.

2D DIVISION.
Ld. Medwyn.

THE river Shinn in the county of Sutherland flows into the Kyle of Oyke, the upper part of the frith of Dornoch, and formed by the confluence of the Oyke, Cassley, Shinn, and Carron rivers. Mackenzie of Ardross, the proprietor of Eastern Fern and Mid Fern on the south side of the frith, raised an action of declarator and damages against Houston of Creich, a proprietor on the north side, setting forth, “That the pursuer is the
“sole and exclusive proprietor of the river Shinn in the county of
“Sutherland, and of the haill salmon fishings thereof, in which
“the pursuer stands regularly infeft and seised in virtue of un-
“questionable titles; and the pursuer is tacksman of the whole

Aug. 13, 1831.

“ salmon fishings of the rivers Oykell and Carron, and of half
 “ the salmon fishings of the river Cassley, situated in the said
 “ counties of Sutherland and Ross; and moreover the pursuer
 “ is tacksman of the whole salmon fishings in the Kyle, or water
 “ or frith of Dornoch, which frith is formed by the confluence of
 “ the said rivers Shinn, Oykell, Cassley, and Carron: That
 “ Thomas Houston Esq., of Creich, is proprietor or trustee, or
 “ manager and occupant of the lands of Meikle Creich, adjacent
 “ to the said frith; but he has no right or title whatever to fish
 “ or kill salmon in the said frith, or in any river flowing
 “ thereto; that nevertheless the said Thomas Houston has
 “ illegally and unwarrantably been in the use and practice,
 “ which he still continues, as shall be specially condescended on
 “ in course of the process to follow hereon, of killing salmon in
 “ the said frith at or near Meikle Creich, and ex adverso of
 “ the said property, and of obstructing salmon in their course up
 “ the said frith to the rivers aforesaid, of which the pursuer is
 “ the proprietor and tacksman, to the injury and damage of the
 “ pursuer: Therefore it ought and should be found, decerned,
 “ and declared, by decree of the Lords of our Council and
 “ Session, that the said Thomas Houston has no right or title
 “ whatever to kill or to take salmon in any manner of way in
 “ the said water or frith of Dornoch, or Kyle of Sutherland;
 “ and the said Thomas Houston ought and should be decerned
 “ and ordained by decree foresaid instantly to cease and desist
 “ from fishing or killing salmon in any manner of way in the
 “ said water, frith, or Kyle at Meikle Creich, and at all and
 “ every other part of the said frith,” with a conclusion for pay-
 “ ment of such a sum as may be “ an adequate compensation to
 “ the pursuer for the great injury and damage which he has sus-
 “ tained in and through the killing and obstructing of salmon
 “ by the defender in the said water or Kyle of Sutherland, and
 “ in and through the usurpations, encroachments, intrusions,
 “ operations, and obstructions of the defender in the said water
 “ or Kyle of Sutherland.” In the condescendence which fol-
 “ lowed the pursuer stated himself as the “ proprietor of Easter
 “ Fern and Mid Fern, which are adjacent to the south side of
 “ the said frith and below Bonar Bridge, together with the
 “ salmon and other fishings appertaining thereto;” but in the
 summons no mention is made of Mid Fern at all, and Easter Fern

Aug. 13, 1831. is only introduced incidenter in another part of the declarator as land belonging to the pursuer opposite to Creich, to which, as was alleged, Houston's boats unwarrantably ferried over and landed persons who had no right to trespass there; neither is it set forth in the summons that the pursuer was proprietor of the salmon fishings appertaining to these ferns.

Houston maintained in defence preliminary,—1. That the pursuer has no title to pursue; being proprietor of the fishings in the river Shinn (which is not admitted) can give him none, and he is not a proprietor of any of the fishings in the Kyle or frith of Dornoch. Supposing these not to have been yet disposed away by the Crown, they are still Crown property; and therefore, supposing this right to be exercised by any person wrongfully or without title, it is the Crown that has a title to challenge its exercise; neither is the pursuer the tacksman of the whole salmon fishings in this frith, and in the rivers connected with it; and if he were, a tack is not a valid title to insist in a declaratory action as to property.

2. On the merits.—If the pursuer had any title to insist, the defender avers that the estate of Creich had a right of salmon-fishing from time immemorial in the Dornoch frith, ex adverso of that property, and that this right has been constantly exercised beyond the years of prescription.

The Lord Ordinary (21st June 1827) repelled the preliminary defence, and decerned, and, in respect the defender had given notice of his intention to bring the judgment under review, found him liable in expenses to the pursuer of this preliminary discussion; and the Court (16th January 1828), on advising a reclaiming note, adhered*; Lord Glenlee observing, “Holding the title “to be sustained only to the effect of allowing the pursuer to be “heard, not as entitled to prevail, I am satisfied that the inter-“locutor is right.”

The case returned to the Lord Ordinary; and condescendence and answers having been lodged, with pleas in law, and the record being closed, cases were ordered to the Court, who, on advising them, (24th November 1829,) † “in respect the pursuer has not

* 6 Shaw and Dunlop, 359.

† *Lord Justice Clerk* observed, The first question is, whether there is *res judicata* here? I am satisfied that our former determination does not interfere with what is now

“ produced or proved any sufficient title to salmon fishings ex Aug. 13, 1831
 “ adverso of the defender’s lands in question,” sustained the

asked. It was on the title as libelled that we decided the pursuer’s title to be heard. For any thing we knew, this defender might have had no title at all, or this might have turned out to be an illegal fishing. Now we have to decide a different question. Mr. Houston produces, as his title, a decree of sale, with fishing, and says that he has had possession of salmon-fishing; and further he says, that as the pursuer pretends to no right in that part of the river where his fishing is challenged, he has no right to bring a declarator of his want of title. It is an important question; but giving every attention to the argument, and the case of Sir James Colquhoun, in which latterly I was counsel, I am satisfied that it is no bar to the judgment which I think ought to be pronounced here. Sir James brought his declarator against the upper proprietors, to get rid of them as pursuers in the action against him. This is not the case in the present instance, neither is there any complaint here of an illegal mode of fishing, but only that the defender’s fishing opposite his own lands injures Mackenzie’s other fishings, and he brings a declarator, without alleging any right there himself. The judgment of the First Division, in the similar case with Gilchrist, appears to be well founded in law. Those in the cases of Tay, Don, &c. are no authority here; and I have no doubt that our former judgment does not fetter us now, and that the judgment of the First Division should be followed.

Lord Cringletie.—In point of form, there is no interference with the previous judgment; and on the merits, if the property of salmon-fishing was not of an anomalous nature, there would be no doubt. It is clear that a man cannot challenge any one shooting or trespassing on his neighbour’s property; but the right of salmon-fishing is somewhat anomalous. In the case of the Duke of Queensberry v. Marquis of Annandale, (M. 14,279,) a party was found entitled to interfere to prohibit an inferior heritor from throwing stones into a river to prevent the salmon going up to him; though a proprietor of an estate, in a district where there is deer, could not prevent his neighbour from following the practice of placing people on his march, at the quarter whence the wind blows, to frighten the deer from leaving his property. There is an admitted title to challenge fishing in an illegal way. Now it is very difficult to distinguish between this and fishing illegally without any right. The pursuer could, under the authority of the case of the Duke of Queensberry, have complained of the defender frightening and stopping the salmon, without killing them; and, if so, why cannot he complain of his stopping them by killing them?

Lord Glenlee.—This was formerly pleaded as a preliminary defence; and all we could consider was, whether a proper title was libelled, not whether a proper title was possessed. The only thing in the defence was the denial of the fact of the title libelled, though it also bore, esto, you have the title, it is not good. The Lord Ordinary, without determining if he had the title libelled, repelled the objection, that if he had, it would not have been a good title; and it was here libelled that he had a tack of the whole fishings, of course including those opposite Mr. Houston’s lands. Undoubtedly, where there is a public law prohibiting any thing being done every person injured by a violation of it has a title to complain; but when the act is not illegal in itself, and there is no allegation that the pursuer has any right to the fishing challenged, it is a totally different thing. Mr. Mackenzie has now produced all his tacks, and it is not averred that he has any right to the fishing

Aug. 13, 1831. defences, and assoilzied the defender from the conclusions of the action, with expenses.*

Mackenzie appealed.

Appellant.—1. The Court has sustained the appellant's title to pursue; and that, in this case, is equivalent to a judgment on the merits, as the defender has failed to show that he has any right to the salmon fishings in question. The distinction taken between a title to insist and a title to prevail has no foundation.

2. The appellant is proprietor of the lands opposite to the lands possessed by the respondent and owner as proprietor or tacksman of the upper fisheries and the fishing in the frith. He has an interest that no person, without a right to fishing, shall fish in the river opposite or below. It is plain that the respondent would not be entitled to obstruct or destroy the fish in their progress up the frith to the higher rivers, neither can he be permitted to kill the salmon by fishing, unless he shows that he has a right of salmon fishery. The titles of the appellant in the lands of Easter and Mid Fern give him a right to fish *ex adverso* of those properties, a right which he has always exercised by sweeping across even to the opposite shore; and this right the respondent, who shows no title, cannot impair. Salmon fishing is *inter regalia*, and only those proprietors having right of fishing from the Crown can fish. The respondent therefore is a mere trespasser. It is a misapprehension of the law to maintain that the respondent is not bound to show a title, if the appellant cannot show a title to the fishings challenged. That very point was decided in the case of Colquhoun, where upper heritors, who could show no title, failed in their opposition to the action challenging their right, at the instance of an under heritor, who did not pretend to a right *ex adverso* of the upper heritors' lands.

opposite to Mr. Houston's lands, and I am satisfied, therefore, that he has no title to interfere.

Lord Pitmilley.—I do not see how it is possible to sustain his right to insist in this action, and I concur entirely in the doctrine laid down by Lord Corehouse in the other case of Gilchrist.

* 8 Shaw and Dunlop, 117.

3. The nicety of special pleading recognized in England is not known in Scotland ; and it would be unjust to introduce it now, to the effect of dismissing the appellant's action, who has framed his summons in the form and fashion usual, and held as sufficient in the Scotch Courts. Aug. 13, 1831.

Respondent.—1. Although the appellant's title to pursue was sustained, that title was only to insist, not to prevail.

2. The proposition that an upper heritor can prevent an under heritor from fishing, merely because thereby salmon are killed which otherwise might have proceeded up the river, is altogether untenable. If the upper heritor can show a right to the lower fisheries, then he will obtain an injunction against the lower heritor, but until he shows that right he cannot disturb the adverse party. He, having no right to the fishings below, has no title to inquire whether the lower heritor has a right or not. The case of Colquhoun does not bear the construction contended for ; and so the Court held, on inquiring as to its facts and circumstances, in the case of Gilchrist,—a question between this very appellant and a proprietor on the south side of the frith, who, without alleging any grant of piscatory, killed salmon opposite his own properties.

3. It is absolutely necessary that pleading in Scotland shall be accessible, and calculated to bring out, in proper form and shape, the true question between parties. Here the summons is fatally defective.

Lord Chancellor.—My Lords, if, on a complete understanding of this case, I had entertained any doubt that the Court of Session had decided well on the matter of law, or indeed if I had doubted the propriety of the decision on the grounds upon which I think your Lordships ought to affirm it, I should certainly have been disposed to call on the respondent to support the judgment. Even if those grounds on which the decision must rest were such that the interlocutor of the Court, which I am about to move your Lordships to affirm, would exclude for ever the party from bringing his rights into discussion again before the Court below in a more competent form, I should have hesitated before I recommended an affirmance without hearing all that could be urged ; but as I do not consider that the interlocutor, on whatever principle pronounced or affirmed, will exclude this party from trying his rights

Aug. 13, 1831.

again if he shall be advised, subject to such observations as were made in the Court below, and one or two which I am about to submit to your Lordships, I have not the least hesitation in sparing your Lordships the trouble of hearing the counsel on the opposite side. The question here arises between Mackenzie, the exclusive proprietor, as he says, of the salmon fishery in the Shinn, and tacksman of the salmon fisheries of the rivers Oykeil and Carron, and the half of the salmon fishery in the river Cassley, and of the whole salmon fisheries in the Kyle, or water or frith of Dornoch, which frith is formed by the confluence of the rivers Shinn, Oykeil, Cassley, and Carron, and Houston, the proprietor and occupant of the lands of Meikle Creich, adjacent to the frith, but below the Shinn, below the Cassley, below the Oykeil, and opposite or nearly opposite to the East Fern and the Mid Fern land, the property of Mackenzie; and Mackenzie claims a right to prevent Houston from fishing, not merely in any illegal way, not merely in any way prohibited by the statute law respecting fisheries in Scotland, (which, as your Lordships know, is in some respects very precise and strict in its arrangements, the value of these salmon fisheries being very great, and the proportion of their value to the rest of the property in some parts of the country still greater,) but that he shall not fish opposite his own land, nor in the neighbourhood of his own land. That he has no right to fish there is placed on several distinct grounds; and one is, that he has no right to fish there at all, because he has no grant of a salmon fishery from the Crown. Now, it is quite clear that that would be distinctly what they call in Scotch proceedings a *jus tertii*, which means, that unless I am damnified, and not only damnified, but have received *damnum cum injuriâ*, unless I am not only hurt by what is done by my neighbour, but hurt by something which he does illegally, I have no right to complain between him and myself that he does a thing which may injure another. It is as true, it might be very agreeable to Ardross, the upper proprietor, and very advantageous to him, to say to Creich, "What business have you to fish there?" "Every fish you catch is so much taken from my net; and you have no right of piscatory in your grant from the Crown; and you can show no user from which the Court might presume a lost grant;" but Ardross is not entitled to say, that, unless he can show that he (Ardross) has such a right against him (Creich), not only Creich has damnified him by taking his fish, but he (Creich) had no right, as against Ardross's rights, to take those fish as they came up; for this right, if not Houston's, is the right of the Crown. What signifies it whether the Crown or Creich takes the fish? Mackenzie is not entitled to set up the dormant right of the Crown, although he may confine the exercise of that right to that which is consistent

with his adverse right, or possible adverse right as superior heritor. Aug. 13, 1831. But then it is said, and that is a proposition in law to be met, that the Crown has all the right to the fishery of salmon in Scotland; that the salmon is inter regalia, or a royal fish; and that no man can claim a right to the fishery of salmon in Scotland but by a grant; and that must be established by the production of the grant, or by long user, which may presume a grant. But before I go to that I shall just state what the law is in this country, as it is laid down with singular precision, like all the decisions of Lord Mansfield, in the case of *Carter v. Murcot*, though the law here is materially different, generally speaking, as respects arms of the sea and navigable rivers on the one side, and private streams on the other. An arm of the sea, between high and low water-mark, is within Admiralty jurisdiction; but there is a common right of all the King's subjects to fish in arms of the sea and public rivers, unless there has been a grant to an individual excluding others, and that can be established only by the production of the grant or by prescription, the Crown having a right to grant several fisheries in an arm of the sea; but that is immaterial to the present argument, generally speaking. Independent of all grants or acts of parliament, the right of fishing in an arm of the sea or a navigable river is in the public at large; but in a private river, in a river not navigable, the right, unless there is some grant or act of parliament to take it out of the provision of the common law, would be *primâ facie* in the owner of the close over which the private river flows; and if there are two owners on the different sides, as is very often the case, the river being the common boundary, each has unquestionably his right *ad filum aquæ*; that is the rule of law, and that is the distinction taken. Now, whether or not this Dornoch frith, if in England, would be held to be an arm of the sea, so that every man, unless there was a particular right constituted exclusively, would have a right to fish, I do not take upon me to say. I dare say it would not be admitted here, though it does look very much like an arm of the sea, as it has the water flowing up very near to the Shinn. But I now take it to be understood by Scotch lawyers that salmon fishery is not open to the public at large, and that there must be evidence of a grant; but the proposition in law I am called upon to meet is this, that the Crown having granted (which grant shall be proved by the production of instruments, or by user, for so many years,) a right of salmon-fishing, fifty miles above the mouth of a certain river, and that right of salmon fishery extending over ten furlongs, or ten yards across the river, or in the length of the river, though there is not a single word of exclusion in the grant, though there is nothing to make it a fishery except quoad that spot; with nothing to exclude the right of fishing above or below, yet, inasmuch as the people for fifty miles

Aug. 13, 1831. below might, by killing the fish as they went up, create a more effective obstruction to the exercise of the right of salmon fishing during those ten yards, unless they can show a separate grant of the same, or of an earlier date by the Crown, the Crown has no right to make a grant to those below ; but that the mere grant of those ten yards of fishery is effectual, even as against the Crown, and creates a right to exclude all the inferior heritors, all those who hold between those ten yards and the sea. Now, if I should say that this is a strong proposition, I should mean to distinguish it, not with reference to the argument by which it was supported, but to the amount of its own force. If I were to say it is a new proposition, I should ascribe to it no originality in argument, nor any great felicity in expression, but I should say it was new in respect of its strangeness. If I were to say it was a wild proposition, I should probably apply a term to it which was justified ; for I cannot conceive any thing more wild than contending that if I grant to A. B. a right to fish salmon for ten furlongs, I exclude all the rest of my subjects from that spot down to the sea for ever from taking a single fish, salmon, sprat, or any other fish that can grow out of spawn. That I think one of the wildest propositions I ever heard as regards the Crown. Even as regards a private individual, it is contrary to every principle of law. Supposing an individual possessed of a salmon fishery along the banks of a river, and that he grants a fishery over a certain spot, as against him, (though against him, as a private person, all things are to be presumed,) the proposition would be untenable for the grant to an individual over that spot would not convey the exclusive use. But then it is said, provided the person so having the grant has been in use all along to exercise that right without interference from the people below, he may now claim it ; but that is merely taking another proposition, for if the heritor above has been in use to exercise the right of fishing without interruption, as it is called vaguely, (to conceal the effect of that argument, suddenly altering the proposition from an untenable one to one which is almost a truism,) without the people below stopping the fish in their way to his net ; if that alone is meant, it is a perfect truism in point of law, for it implies a grant ; it is, exclusive user—a user in me, exclusive of you, Creich ; and then, whether I have it upon parchment, with a seal from the Crown, or have it from long or immemorial usage, it is perfectly clear I have a grant of the fishery above, exclusive of other men having a fishery below ; and if the words do not mean that, then the proposition is just as bad as it was before this new colour was given to it. But, my Lords, if Mackenzie has that grant, if he has that user to show a lost grant, he should have set it forth. But he has not averred it, he has not pleaded it

Aug. 18, 1831.

as your Lordships will see clearly from the pleadings. He says he has the haill salmon fishing in the river Shinn; now, whether it is the river Shinn or the Dornoch frith, is perfectly immaterial, for it would be indifferent whether it was the Dornoch, or the rivers running into it above; but he says, "that the pursuer is the sole and exclusive proprietor of the river Shinn in the county of Sutherland,"—that may be,—“and of the haill salmon fishings thereof;” that means, the haill salmon fishings of the river Shinn, and no more; that he is “tacksman of the whole salmon fishings of the rivers “Oykell and Carron,”—those are the other rivers,—“and of half “the salmon fishings of the river Cassley, situated in the said counties of Sutherland and Ross;” that is to say, all those rivers above situate; that he “is tacksman of the whole salmon fishings “in the Kyle or water or frith of Dornoch, which frith is formed “by the confluence of the said rivers;” that he is tacksman of the whole of those salmon fishings. Then, how does he go on to complain? He complains, not that Houston injured his (Mackenzie’s) right as tacksman of the whole salmon fishings, that is to say, a fishery in gross; but after setting forth that he is tacksman of the whole salmon fisheries—that he is lessee, as we should say in England, of a fishery in gross—he complains, not that the fishery in gross is interfered with, but that a fishery regardant is interfered with. He says, “I am also proprietor of the lands of Easter Fern “and Mid Fern, which are adjacent to the south side of the said “frith, and below Bonar Bridge, together with the salmon and “other fishings appertaining thereto; but you, an inferior heritor, “have interfered with the fishery of which I am not tacksman, but “which I claim to have regardant to two closes of which I am proprietor, and not tacksman.” Was there ever such a case put upon pleading? and this is endeavoured to be met by saying that one fishery is included in the other, as if a lease of a fishery in gross included the right to a fishery in respect to those closes; as if, because I have a lease of a fishery in gross, I have, as included in that lease, the fishery attendant on the close. The appellant proceeds, “that nevertheless the said Thomas Houston has illegally “and unwarrantably been in the use and practice, which he still “continues, as shall be specially condescended on in the course of “the process to follow hereon, of killing salmon in the said frith “at or near Meikle Creich, and ex adverso of the said property, and “of obstructing salmon in their course up the said frith to the “rivers aforesaid, of which the pursuer is the proprietor and tacksman, to the injury and damage of the pursuer.” Now, there cannot be the least doubt that a person who is the owner of the fishery of the river above has, in respect of the estate of

Aug. 13, 1831. which he is owner, a right to prevent obstruction below, not by fishing, which another might do, but by building a wall, by throwing across a weir, or by erecting cruives right across the river, to create a total obstruction;—there cannot be a doubt that, by law, he has a right to prevent that; but I cannot help remarking upon an expression or two which appears in the report of the judgment of the Lord Justice Clerk (probably from the largeness of the manner of reporting), in which he is made to say, “That unless I
“am the owner of some land opposite to the place where the ob-
“struction is complained of, or unless I claim the right of fishery
“opposite to that, I have no right to come by action on the case for
“consequential damage done to my upper fishery by something
“wrongly done in the lower fishery.” That cannot, I feel assured, be intended by him; but I remark upon it, finding it in print, as I know not whether the end of this may be another action, making the condescendence answer to the summons, in which case these expressions might lead to mistake. His Lordship is made to say, “This is
“not the case in the present instance, neither is there any complaint
“here of an illegal mode of fishing, but only that the defender’s fishing
“opposite his own lands injures Mackenzie’s other fishings.” If that were done in such a way as to exceed the bounds of his own private right, something ultra the mere taking fish, though he may use his own property in the way he has a right to do, that is, subject to the exception of his not injuring me; his catching the fish lower down would no doubt be injurious to me, but that would not come within this description, for that he has a right to do, but he has not a right to go beyond that; and the going beyond that, without coming within the provisions of the salmon fishery regulation acts, would nevertheless be *damnum cum injuriâ*, of which I should have a right to complain. But I take still greater exception to what follows: “The
“complaint is, that the defender’s fishing opposite his own lands
“injures Mackenzie’s other fishings, and he brings a declarator
“without alleging any right there himself.” He is not bound to allege any right there. If I have a fishery a mile above, you can use, on your own property, your own fishery, and I have not a right to complain; but if you use your own fishery below, in a manner contrary to law, you entitle me to an action. If you use your lower mill so as to put mine in back water, or you use your fishery against any right of mine, so as to deprive me of my fish, what signifies it that I do not claim a right below? My right is above; but you shall not use your right below, so as to incroach on my right above, by going beyond the limits of your right of fishery. If you do not interfere with my fishery, of course that can raise no proceeding. These are the grounds on which I cannot think that which is stated

can be supported. Possibly it was expressed more largely by the learned Judge than he intended, or probably it may be misreported by the learned counsel. Aug. 13, 1831.

I have already said, that the owner above cannot object to another exercising the right of fishing below on the ground that he fishes against the right of the Crown, for it is the business of the Crown to look after the fishery below; that is either in the Crown or in the person claiming it; and it is perfectly immaterial to the person above in which it is, unless he can show that he has a grant from the Crown which prevents such right being granted; and a long and uninterrupted user of the right would be very good evidence of that, as much as if he produced the parchment. But on being driven from that the appellant had recourse to the second article of his condescendence, and there he says that he claims the right below as an exclusive right. And how does he claim it? In these words, "that the pursuer is also proprietor of the lands of Eastern Fern and Mid Fern, which are adjacent to the south side of the said frith, and below Bonar Bridge, together with the salmon and other fishings appertaining thereto." That would be altogether correct if found in the summons, but the summons only states a fishery in gross; and under that I am clearly of opinion he cannot raise an issue of right inconsistent with the general rights, a right as arising from a fishery regardant, belonging to those two closes which are not named, though one of them, Eastern Fern, is named *alio intuitu*, inferentially only. Upon these grounds, my Lords, I clearly agree with the judgment of the Court below. At the same time I think it necessary to add, that I wholly concur in the able argument used by the learned counsel on behalf of the appellant as to the strictness of the rule I am now applying to this case, and that there is a laxity of pleading common in the Court below. I admit that, over and over again, I have seen cases where there has been as great a deficiency of accuracy and clearness and technicality, in raising a question upon the record of pleadings, as appears upon the pleadings now before your Lordships; but that shows the absolute necessity, which I fear exists, to enforce in Scotland a greater degree of strictness and technical accuracy in drawing those pleadings; and if the Court below will not confine the practitioner to something like accurate rules, I am quite certain the only way in which they can be ever kept to those rules is by the House supplying the defect. In the present case it may be said the appellant has no ground of complaint, for you are affirming the judgment of the Court below, and that Court may have proceeded upon those grounds; possibly they may, but I see no trace of that. They appear to have proceeded on other grounds, some of which are not quite so

Aug. 13, 1831. accurate, and I find no trace in these proceedings of any remark whether the case is borne out by the different allegations in the summons and the condescendence—I do not see any point of that kind raised by the learned Judges. With respect to the case of Sir James Colquhoun, as much stress is laid upon it by the appellant, I will say one word. On looking into that case, it is quite manifest that it does not bear them out. In the first place, I cannot there find any words copied from the summons which enable me to see what the averment in the summons is. One side say, without quotation, that the summons was so and so ; I think it is in the tenth folio of the printed case. “ The summons in that action set forth, “ that the pursuer was infest and seised in the salmon and other fish- “ ings in the loch of Lochlomond and water of Leven ; that he and “ his ancestors had, past all memory, exercised their rights of fishing “ by having certain fixed posts driven into the bed of the river, and “ nets hung or fixed thereon.” Now, that does not state what were distinctly the words of the summons. For aught I know, there may have been words which would make the case wholly different from the present ; but it is very fit your Lordships should bear in mind what the Court below appear to have borne in mind, that it was the third action—there having been two preceding actions. I have looked into the whole of those actions, and I find Sir James was the defender in the first two, and the defence was raised by him as to the magistrates in one case and the upper heritors in the other, and he denied the right of the upper heritors to come into Court as plaintiffs, and the Court gave the go-by to that contention. They said, at all events the magistrates have a right to come. The case came up by appeal, and then there was, at the eleventh hour, a judgment below, finding “ that the other pursuers of the “ said conjoined actions, they having by that time conjoined, have not “ instructed any sufficient right or title to insist therein, or to defend “ against Sir James Colquhoun’s actions, and therefore dismiss the “ said conjoined actions, so far as they are concerned, and decern “ against them.” No doubt this, at first sight, appeared to show that the actions were dismissed on something like the ground on which Mackenzie puts it here ; but in the question, the case between this very Mackenzie against Gilchrist of Ospidale, in relation to fishings in this very frith, the Court suspended their proceedings to have the proceedings in the case of Sir James Colquhoun and of Lord Gray against the town of Perth inquired into. They had also before them the case of the Duke of Hamilton ; but they held that the first did not apply, and they passed by the others. I must say, that if the case of Sir James Colquhoun had maintained so wild a proposition as that the proprietor of the upper land has a right to say to the proprietor of

Aug. 13, 1831.

the land lower down, "Do not you catch that fish in the river in the course of your territorial right, not because it interferes with my right, but because the Crown has a right to the fish,"—if that had been the ground of the decision in the case of Sir James Colquhoun, I should not have held myself bound by it. Such a doctrine is so contrary to all principle that one must have supposed some other ground for the judgment. I therefore would move your Lordships, that the interlocutor now complained of be affirmed, but I need hardly add without costs.

Spankie.—As Your Lordship was so good as to throw out, that it might be competent for the appellant to proceed afresh, if he shall be so advised, may I take the liberty of suggesting whether the words may not be introduced "saving such right of action as is competent?" The introduction of those words might prevent a long litigation to come, in the Court below, on the point whether your Lordships had not concluded us.

Lord Advocate.—The only judgment of the Court below, as respects the pursuer, is, that he has shown nothing; therefore, supposing he really has a good title, this can never shut it out in a case in which he can show something.

Lord Chancellor.—The ground of decision was, that "the pursuer had not produced or proved any sufficient title." Proved was clearly a wrong word. The appellant never came to proof. If I were to propose any alteration, it would be to put out the word proved; but it is not worth while. Supposing, therefore, that he can prove an exclusive right—supposing, he can prove that the party below used the right nimiously—he may raise his summons, and bring his action in different words, and thus raise the question of new. I think the case may safely stand on the simple affirmance.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of be and the same is hereby therein affirmed.

Appellant's Authorities.—Glengary, 20th Jan. 1826 (4 Shaw, p. 371); Don Fishings (4 Shaw, p. 643); Balfour's Practicks, p. 545; Dundas, 26th Nov. 1744; (Hailes, Dec. p. 601); Sir James Colquhoun, (Mor. Dec. 12,827); Fac. Col. 4th July 1804.

Respondent's Authorities.—Mackenzie (7 Shaw, p. 297.)

FRASER,—MONCRIEF, WEBSTER, and THOMSON,—Solicitors.

No. 34. ELIZABETH SCOTT, Appellant.—*Lord Advocate (Jeffrey)*—*Mr. John Campbell.*

ROBERT YUILLE, Respondent.—*Mr. Tinney.*—*Mr. Rutherford.*

Cautioner.—Stat. 1695, c. 5. A party having in a bond for borrowed money bound himself with and for another as cautioner, surety, and full debtor, without a clause of relief, or an intimated bond of relief apart, found (affirming the judgment of the Court of Session) not to be liable after the lapse of seven years.

Personal Exception.—Circumstances not held to bar the cautioner from pleading the statute.

Sept. 15, 1891.

2D DIVISION.
Ld. Cringletie.

WILLIAM and ROBERT SHORTRIDGE, in 1810, borrowed from William Scott senior and William Scott junior 1,242*l.*, for which they as principals, along with George Yuille and Robert Yuille as cautioners, granted a bond, which, after narrating the loan of the money, proceeded: “Therefore, we as principals, and with
“and for us, George Yuille and Robert Yuille, esqrs., both
“merchants in Glasgow, as cautioners, sureties, and full debtors,
“bind and oblige us, jointly and severally, and our respective
“heirs, executors, and successors whomsoever, to make payment
“to the said William Scott senior and William Scott junior,
“&c. of the foresaid sum of 1,242*l.* sterling of principal, with
“interest and penalty.” The bond did not contain any clause of relief, nor was executed any bond of relief apart. In 1819 the Shortridges became bankrupt, and George Yuille died. Thereafter William Scott senior died, and the right to the bond became vested in William Scott junior, his residuary legatee. Under the settlement of William Scott senior, his niece Elizabeth Scott, sister to William Scott junior, became entitled to an annuity of 100*l.* per annum. In security of this annuity, William Scott junior, in March 1823, assigned this bond, on which no diligence had followed, to Elizabeth Scott. Robert Yuille, the surviving cautioner, acknowledged intimation of the assignation, and paid full interest on the bond, and afterwards at a reduced rate, at his request, until a few days before Whitsunday 1824, when, holding that seven years having elapsed he was, by statute 1695, c. 5., relieved of his cautionary obligation, he intimated to her that he no longer held himself liable for the debt.

Elizabeth Scott charged him on the bond, and Yuille suspended, raising two points, 1st. The application of the statute to a question where, although an express cautionary appeared ex facie of the bond, there was no clause of relief in the bond, nor separate bond of relief. 2d. How far the special circumstances in the conduct of the cautioner had created a *personalis exceptio*, to plead the statute?

The Lord Ordinary reported the case to the Court on memorial *, who, after a hearing in presence (28th Nov. 1827), found;

* The Lord Ordinary added the following note:—"The statute 1695, cap. 5, relative to principals and cautioners, proceeds on this, that by common law a cautioner was bound as effectually and as long as the principal debtor, whereby many were reduced to ruin. It then enacts, first, That no man binding himself for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for longer than seven years after the date of the bond; but that from and after the said seven years, the said cautioner shall be *eo ipso* free of his caution; secondly, and that whoever is bound for another, either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner to have the benefit of this act, providing that he either have a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving of the bond.

"Under this act no man has ever ventured to say that where two or more are bound, conjunctly and severally, in a bond, without any clause of relief to any of them, any of them is free, by the mere lapse of seven years; such a plea was never heard of; the bond subsists for forty years. Again, if the statute had intended that a man bound expressly as cautioner was to be free at the end of seven years, merely because he was bound as cautioner, it would have so enacted, but it does not do so; it enacts, that when a man is bound as cautioner, † he shall be understood to be a cautioner to have the benefit of this act, provided that he have either a clause of relief in the bond, or a separate bond of relief intimated to the creditor at his receiving of the bond.' If, then, he have not a clause of relief in his bond, or a separate bond of relief intimated to the creditor at his receiving of the bond, it seems to the Lord Ordinary to follow undeniably that the person may be a cautioner for another, but is not a cautioner to have the benefit of the statute 1695, c. 5.

"2d. The Lord Ordinary understands it to be now a fixed principle of law, that whenever a statute alters the common law, or confers privileges of any sort, not competent by common law, and this under certain conditions or provisions, these must be specifically and in *ipsis terminis* obeyed, otherwise there is no claim to the benefit of the statute. It is not, therefore, enough that a person be bound as a cautioner in any bond or contract, in order to entitle him to plead the limitation introduced by the statute 1695, c. 5. He must observe its provisions, and have the clause of relief in the bond, or a separate obligation of relief intimated to the creditor; and it won't even do to intimate this at any time; it must be done when the creditor receives his bond.

"Now the Lord Ordinary admits that different interpretations have been put by the Court on this statute. In *Ross v. Craigie*, 11th December 1729, the Court thought it was enough that a person was described 'to be cautioner, to entitle him

Sept. 15, 1831. “ That the suspender is entitled to found on the septennial limitation of the statute, without a clause of relief in the bond granted by him as cautioner, surety, and full debtor for the principals in the bond charged on,” but remitted to the Lord Ordinary to hear parties further on the other points in the cause. * Thereafter the Lord Ordinary suspended the letters with expenses, and the Court adhered.†

Elizabeth Scott appealed.

Appellant.—1. The words of the statute expressly and explicitly ordain that only such cautioners shall have the benefit of the limitation as have either a clause of relief in their bond, or a separate bond of relief intimated to the creditor. To disregard this provision would not be a mere liberal construction of the statute, but a direct infringement of a positive and precise enactment. Any cases sanctioning a different doctrine are against law and should be overruled.

2. The cautioner has by her acts and deed barred herself from founding on the statute, and remains bound.

Respondent.—1. Where a party is bound expressly as cautioner in a bond, the statute does not require a clause of relief, or a separate bond of relief; that is only necessary where the party has been bound as co-principal. The provision in question was introduced to protect the creditor, and if the bond shews him

“ to the benefit of the statute.’ In *Burnet v. Middleton*, 39th June 1742, the Court found the reverse. In cautionary obligations in a suspension, the Court have found that the statute did not apply; and here there could be no doubt as to the obligant being a cautioner. In the case of *Douglas, Heron, & Co. v. Riddick*, 22d Nov. 1792, the Court returned to that of *Ross v. Craigie*, most improperly in the Lord Ordinary’s opinion. On appeal of the case, the House of Lords did not affirm the decision on that ground. They found it unnecessary to determine it, as there were other grounds for affirming the judgment. See *Morrison’s Dictionary*, p. 11,032, and 11,045 et seq. It seems clear to the Lord Ordinary that the House of Lords were not satisfied with the law to be deduced from that decision, otherwise they would have affirmed it; and the Lord Ordinary, considering the case open, thinks it right to give the Court an opportunity of reconsidering it; presuming at same time to give his own decided opinion against *Ross v. Craigie*, and the reiteration of that judgment in *Douglas, Heron, and Co. v. Riddick*.”

* 6 Shaw and Dunlop, p. 137.

† 8 Shaw and Dunlop, p. 485.

that the party is a cautioner, any other information of that fact is clearly uncalled for. That has been the construction given to the statute in various cases, and in practice has been relied on by conveyancers. Sept. 15, 1831.

2. The respondent is not by his conduct barred from pleading the statute.

Lord Chancellor.—My Lords, I have, for a considerable time, formed an opinion upon the first point which has been raised before your Lordships, and have now upon the second point also come to an opinion, that I ought to advise your Lordships to affirm the decree of the Court below. The two points to which I have adverted have been very fully and ably argued at the bar. On the question touching the construction of the act of parliament, taken upon its own words, or upon the authority of the cases which have been adverted to, I entertained no doubt at any time, and therefore I shall not trouble your Lordships upon it at length. The act was passed in the year 1695, and is not very accurately penned, an instance of which occurs in the use of the words “said cautioner,” in the clause “as also of the “said cautioners being still bound, conform to the terms of the bond, “within the said seven years, as before the making of this act.” I have taken an opportunity of referring to the printed statutes, and not only to the printed statutes in common use, but to the very valuable reports possessing the authority of fac-similes of the ancient records, and I find that the clause exists in precisely the same form in that original. Be that as it may, the words of the statute undoubtedly, in the clause principally brought into question here, are by no means clear, and from that want of clearness has arisen this discussion, both in the Court below and at your Lordships’ bar. After the statement, that many persons and families have been injured by men’s facility to engage as cautioners for others, who, afterwards failing, have left a growing burden on their cautioners, without relief, it is statute and ordained, “that no man binding and “engaging for hereafter,” that is, in future, “for and with another, “conjunctly and severally, in any bonds or contracts for sums of “money, shall be bound for the said sums for longer than seven years “after the date of the bond”—not that no action shall be maintained—and this is a very material distinction, in reference to the second part of the argument—not that no legal remedy shall continue longer, as against the obligor or cautioner, but that he shall not be bound—the obligation shall cease and determine at the end of seven years; and then, having put affirmatively the extinction of the obligation, it proceeds to put it negatively, by words more strong than I

Sept. 15, 1891. remember to have seen used in any statute, Scotch or English, with respect to any thing in the nature of limitation or prescription, (I shall presently shew I do not think it involves either limitation or prescription;) "but that, from and after the said seven years, the said cautioner shall be eo ipso free of his caution." Nothing can be stronger than those terms. The statute lays down, first, that after seven years the obligation shall be extinguished—shall cease to exist; and secondly, as if that were not enough, that the cautioner shall, after the lapse of that time, be free eo ipso; that is, he shall, by the bare lapse of time—without any other circumstance—without any release—without any more ado but the lapse of seven years, be eo ipso entirely free and discharged from his caution. Then, my Lords, all this having been ordained with respect to the person who is cautioner or co-obligor with the other, comes the clause on which this question arises—"and that whoever is bound for another, either as express cautioner"—that is unnecessary—that is superfluous; therefore something must be meant by that beyond what had been done before—"or as principal or co-principal, shall be understood to be a cautioner, to have the benefit of this act, providing that he have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving of the bond"—that is to say, the bond of relief must be intimated personally to the creditor—the obligor knows his own obligations—but the bond relief, it is to be intimated personally to the creditor at his receiving of the bond. Now, there may be some doubt whether that does not mean the principal bond. I rather incline to think it does. It certainly can only be from the time that that is intimated to the obligee that the seven years can be taken to run, for it would be the hardest thing in the world if you were, at the end of six years, to convert a man into a cautioner; therefore I conceive the bond of relief apart must be part of the same transaction, and be intimated to the obligee. The construction contended for by the appellant is, that the part I have last read of this remedial act, beginning with "whoever is bound for another," is not to be taken as an extension of the remedy, as a new clause coming in where the first fails, but that it is to be taken rather as an exception out of the restriction of the persons who shall have the benefit of the general provisions of the act; because, though in one case, they extend to principals and co-principals, yet, according to that construction, they shall be restricted as to remedy in respect of express cautioners. My Lords, this is not, in my opinion, a sound construction. It is plainly contrary to the general meaning of the first clause. It is not by way of exception that those words are introduced into the act, but by way of express provision; this is by way of addition—this is some-

thing adjoined into what had passed before, as if the legislature had said, first, let it be understood whoever is bound for another as express cautioner shall have the benefit of this septennial limitation; and next, whoever is bound as principal or co-principal shall have the benefit of the act, provided that he is so made a cautioner, not by being express cautioner, but by having a clause of relief in the bond, (one case left unprovided for by the generality of the first part of the statute,) or a separate bond of relief, intimated at its execution to the obligee—to the creditor, which is another case left unprovided for by the first part of the act. There is another reason, for which I hold this to be the sound construction of the statute. Intimation of the bond of relief apart is perfectly intelligible, if the person is bound as co-principal and does not, on the face of the instrument which binds him, appear to be a cautioner; then it is very fit that the obligee should know the true character of that person so as not to allow the seven years to elapse, which would extinguish his remedy against the cautioner. But it is perfectly unintelligible that this bond of relief apart must be intimated at the delivery of it, if it is to be applied to the express cautioner. What is the use of intimating it at the delivery? The instrument itself, which declares the cautioner, is sufficient intimation to the obligee that it is at his peril if he does not take his legal remedy in the seven years; but it is perfectly intelligible, as respects the co-obligor, who does not appear upon the instrument to be an express cautioner, that there shall be an intimation. If the provision as to a clause of relief in the bond, which gives him the intimation at once, be perfectly intelligible, is it not consistent with the remedy, and just towards the obligee, that if the bond of relief is apart from the principal instrument, so that upon the face of it he shall have no such notice, he shall have positive intimation of the bond, that he may at once know that the man whom, upon the face of the instrument, he never could have discovered to be a cautioner, and therefore entitled to avail himself of the septennial period, is a cautioner; and that, therefore, it is at the obligee's peril, if he does not look well after him? My Lords, the cases, when you come to look into them, are really in favour of that construction. In the first place, the case of Ross—that I will not advert to particularly, because that is admitted to be on all-fours with this, and that if the one stand the other must; but the authority of that case is disputed, and it is said that subsequent cases do not bear it out. I do not think, however, that this is by any means the only case. I think the case of Gordon is an authority, though decided, undoubtedly, on the other point; yet that case never would have come before this House for their decision, if this case of Ross was not well decided. The judges who decided

Sept. 15, 1831.

Sept. 15, 1831. that case of Gordon had certainly the same view, or they would not have found "that the seven years' prescription by the act of parliament of 1695 doth in this case run, not from the date of the bond, but from the date of the letter." Now, there was no clause of relief in that bond, nor was there any bond of relief apart. Then, what is the meaning of this, if a clause of relief in the bond, or a bond of relief apart, is necessary to give the benefit of the statute of 1695 to the cautioner. They say that the prescription in the act of parliament of 1695 does in this case run, not from the date of the bond, but from the date of the letter. If the case of Ross is law, it is an authority for this decision; for there was no clause of relief in that case, neither was there a bond of relief apart intimated to the creditor. If it is not law, there would be in the case of Gordon not only no running from the date of the bond, but no running from the date of the letter; this case of Gordon, therefore, is just as much a case upon all-fours with the present as the case of Ross, so far as regards the first point. Then, my Lords, I find the case of Douglas was decided by the Court of Session twice—explicitly decided; and though true it is that the House of Lords did not deal with that proposition, because it was unnecessary, I do not consider that to be an overruling of the judgment of the Court below, but, as far as it goes, the decision here is consistent with it; for unless the Court were of opinion that the septennial period would but for other circumstances have run, there would have been no necessity to go into that other point; and the House of Lords ought to have said, You have no business to go to that, for the septennial period would not run. Their going into the circumstances seems to imply that it would have run, but for those circumstances. Those cases, therefore, appear to me to be authorities applying distinctly to the case now before your Lordships. Then, my Lords, let us look to the authority, at least to the decision in the case of Ninian Hill, in 1787. That case recognizes the same principle here contended for, and I cite that, though a distant case, because I find Mr. Baron Hume, the professor of Scotch law, resting upon it, among other authorities, his opinion of the construction of the act; he cites that case, as well as the case of Ross, as plainly laying down the law in the way I state, and he gives it in his lectures as the known and recognised construction of the act of parliament. Erskine's authority, as far as it goes, is to the same effect. Lord Bankton's authority is express; he was about contemporaneous with the decision of Burnet, relied upon on the other side; and he says, "Immunity to cautioners takes place where no diligence is done against them within seven years of their obligation." This holds where they are either bound expressly as cautioners, so insert in the bond, or a bond of relief is granted to them, and intimated to

the creditor. He puts two cases, just as I do: He says, if either the person is expressly a cautioner by the frame of the bond, or, not being a cautioner by the frame of the bond, if he takes a bond of relief apart, and intimates that to the obligee, then the act applies, which is just the case at bar. Burnet's case has been commented upon in the course of the argument, as it was in the Court below: that case was clearly decided, if Lord Kilkerran is any authority, it was clearly decided, if Lord Elchies is any authority—on this ground, that the word “for” not being in the cautionary obligation, he was not a cautioner upon the face of the bond. Then, if he was not a cautioner upon the face of the bond, he comes within the latter clause, and he behoved to have a separate bond of relief intimated, otherwise he did not come under that part of the statute, namely, the general enactment of relief. Upon these grounds, therefore, I entertain no doubt that the Court of Session has come to the proper decision on the construction of this statute, and I hope we shall never have the question again raised in the Court of Session, or, at all events, not again brought to this House.

The next question was, whether the payment of interest subsequent to the seven years, or the acknowledgment of intimation of assignation by the cautioner, was sufficient to take him out of the statute? And I hold, for the reason I am about shortly to assign, that the Court below was right here also, for that those facts did not take the case out of the statute. This is not a prescription or limitation in the common sense of the word. I have stated already, in going over the act, that the words are of a very different and much stronger nature, and that they effect a complete extinguishment of the debt, as much as if the seal were raled from the bond—as much as if there was a release, and even more—it is a statutory extinguishment of the cautionary obligation;—the words are as strong and as stringent as it is possible for lawyers to make them. My Lords, I find this is the opinion of a very high authority in the law of Scotland, I mean that of Erskine, who employs almost the words I have now made use of; for he says, “though, in compliance with the common way of speaking, this statute is classed here among those which establish the short prescriptions, it would seem that the limitation of cautionary obligations is somewhat stronger than the prescription, notwithstanding the decision observed to the contrary. The act 1695 provides, not that cautionary engagements shall prescribe in seven years—for prescription is not once mentioned in the statute—but that no cautioner shall continue bound for a longer term than seven years, and that after that period he shall be eo ipso free—this emphatical expression seems to be made use of on set purpose, to distinguish the limitation from prescriptions, and to make the

Sept. 15, 1881. “ lapsing of the seven years a virtual avoiding or discharge of the “ obligation.” Now, can I say, when not the action is barred—when not the remedy is taken away, but when the obligation is extinguished and nullified—that the payment of interest, which he was not bound to pay, or that the acknowledgment of the intimation of a subsequent assignation, revives the obligation and again restores to full force and vigour the debt, after it had previously ceased to have any existence? The case of Carrick which goes the length of deciding, that there being no obligation on the party to pay, if, under those circumstances, he had even paid the principal, he would have a right to call for it back, is strongly in favour of the view I take. For these reasons I humbly move your Lordships that the interlocutors appealed from be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Statute 1695, c. 5. Ross's Lectures, p. 81; 3 Ersk. 7, 9; 1 Stair, 17, 9; Ballantine, 22d Jan. 1708 (Mor. 11,011); Stewart, 22d July 1712 (Fountainhall II., 758); More, 16th Feb. 1710 (M. 11,011); Scott, 8th Feb. 1715 (Mor. 11,012); Forbes, Feb. 1726 (Mor. 11,014); Burnet, 29th June 1742 (Mor. 11,018); Blackwood, 9th June 1752 (Mor. 3396); Kay, 4th Dec. 1742 (———); Hogg, 9th July 1765 (Mor. 11,029); Howison, 7th Dec. 1784 (11,030); Elchies v. Bill of Exchange, No. 11; Clerk Home, p. 20; Gillespie, 15th Jan. 1736 (Elchies Bill of Exchange, No. 11); Andrew, (Buc. Rep. p. 52); Douglas, Heron, and Company, 20th Nov. 1792 (Mor. 11,032).

Respondent's Authorities.—Statute 1695, c. 5. Clark, 10th March, 1792 (——); Douglas, Heron, and Company (——); 1 Ersk. 7, 24; 3, 3, 65; Black. Com. p. 87; Gordon, 19th Jan. 1715 (Mor. 11,037); Ross, 11th Dec. 1729 (Mor. 11,014); Munro, 22d July 1741 (Elchies Cautioner, No. 10); Hill, Aug. 1787 (——); Forbes, II. 3, 2, 3; 2 Bank. 12, 30; 1, 23, 48; 2 Ersk. 2, 24; Baron Hume's Lectures; 1 Bell's Com. p. 273; Bell's Prin. p. 146; Russell on Con. p. 486; 2 Juridical Styles, 2d Edit. p. 49; Bell's Law Dic. v. Prescription; M'Leilan, 8th July 1725 (Mor. 4967); Balfour, 18th Jan. 1670 (Mor. 5640); Carrick, 5th Aug. 1778 (Mor. 2931).

RICHARDSON and CONNELL, — MONCREIFF, WEBSTER, and THOMSON, — Solicitors.

JOHN and WILLIAM DIXON, Appellants.—*The Lord Advocate*
(*Jeffrey*)—*Mr. Sandford*—*Dr. Lushington*.

No. 35.

MONKLAND CANAL COMPANY, Respondents.—*Mr. John*
Campbell—*Mr. Rutherford*.

Et contrà as to expences.

Acquiescence.—Circumstances under which (affirming the judgment of the Court of Session) a claim for repetition of money alleged to have been paid in ignorance, held to be barred.

Condictio indebiti.—Is there by the law of Scotland a *condictio indebiti*, where the ignorance is not *facti* but *juris*?

See the case *William Dixon v. Monkland Canal Company*, Sept. 17, 1831.
1 *Wilson and Shaw*, p. 636.*

1ST DIVISION.
Ld. Corehouse.

It appears, that when the Monkland Canal Company, in August 1801, raised the tonnage from the original rate of 1*d.* per ton per mile to 1½*d.* on all distances less than nine miles, William Dixon, the father of John and William, objected to the legality of this increase, obtained an interdict, and withheld payment of the dues. The Canal Company sued him before the Sheriff of Lanarkshire for the amount incurred up to the 28th March 1804. The Sheriff decerned for that amount. Dixon presented a bill of advocation, which the Lord Ordinary refused. Dixon acquiesced in this judgment, and paid up the arrears, and continued to pay the increased rate until the year 1815, when he instituted the proceedings, and brought them to the conclusion detailed in the report of the case above referred to.

Founding on the judgment thus obtained in the House of Lords, his sons, John and William Dixon, raised, in 1826, a new action of repetition against the Canal Company, concluding for 4,023*l.* as the excess of canal dues above 1*d.* per mile paid by them or their father since the year 1801, when the first increase on the rate had been made, down to 1815. Subsequently, how-

* In page 638 of the report of the case, delete from lines 12 and 13 the words, "which was not challenged or objected to, but," and introduce, "which were challenged by Dixon, but without success. In 1815, however,"—and in the beginning of Lord Gifford's speech substitute "William Dixon" for "John Dixon."

Sept. 17, 1831. ever, they restricted their claim to the excess levied after the 28th March 1804. The Canal Company pleaded homologation and acquiescence by the pursuers. The Lord Ordinary having reported the question on cases, the Court found, (May 27, 1830,) “ That the pursuers, John and William Dixon Esquires *, have, “ in their pleadings and at the bar, abandoned that part of their “ claim which relates to the dues said to have been exacted “ prior to the 20th March 1804, and therefore assoilzie the “ defenders therefrom; and as to the claim for repetition of “ the other sums concluded for, Find, that Mr. Dixon, having “ voluntarily paid these duties, and having failed to put the “ Monkland Canal Company on its guard by any requisition “ or intimation that the Company should deepen the canal, or “ that otherwise he did not consider himself liable for the duties, “ the pursuers, post tantum temporis, are not entitled to repetition of these duties, and therefore sustain the defences founded “ on the above circumstances, assoilzie the defenders from the “ conclusion of the action, and decern: Find no expences due “ by either party.”

Dixons appealed on the merits; the Canal Company as to the costs.

Dixons.—The duties in question were paid in error, and consequently the appellants are entitled to repetition. The present is precisely the case to which the *condictio indebiti* applies. The point is no longer open, as the right to recover has been settled by a judgment of the House of Lords, in a case between the same parties, and relating to the same matters. It is altogether out of the question now to enter on the inquiry whether the Company could increase the rates before deepening the canal. There never was any act of homologation by the appellants or their father; nor was there any voluntary acquiescence. Payment was refused, and ultimately was yielded to only under the pressure of a decree of Court; but the error of a court of justice should not prejudice the party paying on compulsion.

* 8 Shaw and Dunlop, p. 826.

Monkland Canal Company.—This is a very different question Sept. 17, 1831.
from the one carried to the House of Lords in 1825, and the judgment there pronounced cannot avail the appellants in the present claim. The decree of the sheriff, affirmed by the Lord Ordinary, creates a *res judicata*, which the appellants cannot overcome; besides, they are bound by acts of homologation and acquiescence on the part of their father. The doctrine of *condictio indebiti*, on which they rely, is inapplicable here; at the best it is founded on equity, and would be met by the equity of protecting present shareholders from making a restitution, which, if due at all, should have been exacted from the partners of the Company when the increased rates were levied. Besides, it is preposterous for representatives to bring forward a claim, which, in fact, was abandoned by the predecessor himself.

Lord Chancellor.—My Lords, I am not impressed sufficiently with the danger of appearing to sanction the introduction of any thing novel in the law of Scotland, and thereby to unsettle the fixed principles of jurisprudence of that country, to induce me to abstain from delivering to your Lordships the opinion I have formed upon this case, even though I am perfectly sensible, that to one or two of your Lordships I may appear to run counter to some of the authorities which have been cited at the Bar. I do not think that it is necessary, in order to dispose of this case, to raise the general question, Whether a party can recover money paid under a mistake of law, or without due knowledge of all the facts, and (for this qualification must be added, even in an English Court,) where there is nothing against good conscience in retaining the money; that is to say, where the payor has not been induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid, or any other fraudulent interposition, which would make it contrary to good conscience for him to retain it. I hold it neither to be a wise nor a convenient course for Courts of Justice to go out of their way to moot general propositions; yet, on the other hand, we ought not to feel too great an indisposition to advert to them, when the natural course of a case, upon its own merits and facts, leads us very near any important principle; because, although the settlement of the point is not of the first necessity, it is very proper that the law should be so settled. My Lords, if all the things which are now reckoned *obiter dicta*—that is to say, all matters which are not of the first necessity to the question before the Court—were struck out of some of our old reports, (I particularly refer to the most celebrated of these reports, namely, Lord Coke's,) a very great part of the “Corpus

Sept. 17, 1881. *Juris Anglicani*" would not have existed, because many of the resolutions of the Judges in the Courts are not of the first necessity to the decision of the cases upon which they were come to. I could mention various instances to which this observation applies. Those resolutions of the Courts are not, however, wide of the point; they are germane to the matter in issue, and they are reckoned, at this day, of as much authority in settling the law as if they were express decisions upon the points in issue. Now I think the present case comes so very near the question I have mentioned as to make it rather convenient I should say a word upon it.

No doubt there was a great difference of opinion among the Roman lawyers, as to the limits of the proposition, how far *ignorantia juris*, or *ignorantia facti* might be held to give a title to the protection of a *condictio indebiti*, and as to how far the doctrine relating to *indebiti solutio* was confined to cases where the fact was unknown or mistaken, or extended also to cases where the law was unknown or mistaken. A great distinction was taken between a volunteer payment and one where the party was in *damno vitando*; and we may say there is authority in the civil law which carries the proposition to the length of putting a party who is the payor of an *indebitum* in the situation of the party who has made an *indebiti solutio*, and therefore entitled to a *condictio indebiti*. But whoever has attended to this subject will be satisfied, that it is hardly possible to conceive a question which raises more difficulties, and which, in explicating it, and following it into its consequences, would, in practice, be attended with more interminable mischief. Now I will not go widely into this field, but I will just stay to comment a little upon a case which raises this point at once, and in very lively colours; I mean the case of *Carrick*. It is needless to say that this is the only decision where you have all the facts which are relied upon, either by the counsel at the Bar or referred to by the text-writers, as authorizing the general proposition, that it makes no difference whether the *ignorantia* is *ignorantia juris* or *ignorantia facti*; and when we come to look at it, we find that the proposition is at all events *obiter dictum* in that case, because it is clear there was *ignorantia facti* there; for the party alleged that he was ignorant that the seven years had elapsed, although in fact there had been a lapse of eight years. It is in the course of the argument that the observation comes from the Bench, which alone, and not the principal point of the case, is the ground of this case being cited in the question before us. "It makes no difference," the Bench say, "whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and when payment is made *sine causâ*, it will be presumed to have proceeded from error, and not donation,

Sept. 17, 1891.

“ unless the contrary can be proved.” Now, observe what the consequence of that proposition would be, if, as the Judges say, it makes no difference whatever as to the *indebiti solutio*, and the *condictio* following upon it, whether the *indebitum* was paid from error of fact or from error of law. Then it is clear, that if a person makes an error with respect to the law touching the period of limitation, in law he was not bound to pay; there was no law to make him pay, except the natural duty to pay his debt, but that was all. It was not like the natural duty of a man to provide for his child. He, from ignorance of the law, paid; but if he had known the law, he would not have paid. Then, what a door does that open? It opens, at all events, an inquiry in each particular case. I cannot withdraw from that proposition, nor can I allow counsel to withdraw from it, unless he will provide a shelter from its scope, by showing some restriction of it which shall be consistent with principle. Now see the sort of inquiries to which this would lead. A man alleges, that he would not have paid if he had known the law. “ I was bound for a friend,” says he, “ but if I had known that “ thereby I was not jointly and severally liable, I should have “ taken care not to have paid till the principal was discussed; for “ that is the Scotch law. But I have paid. I knew all the facts— “ I knew that he had not been discussed, but I did not know “ the law; I did not know that this was a bond which made me a “ cautioner, and therefore that I was entitled to discussion. And “ having taken the opinion of counsel, who tell me, that in a case “ lately in the Court of Session, it was held that if A. becomes “ bound jointly and severally with B. for sums of money lent to B., “ that is not a cautionary bond; therefore I did not think I was “ a cautioner, and therefore I paid the money under ignorance. It “ is very true, I took the opinion of counsel, and he referred me to “ the book, and I saw as plainly as possible what you now explain “ to me, that by the terms of my bond I was a cautioner; but I am “ a very stupid sort of a man. I had got, it is true, a very learned “ opinion, and I had access to all that you have access to, plus the “ opinion of counsel which you never saw; but I am very stupid, and I “ did not understand the legal phrases, and therefore I did not know “ what discussing means, or that I was entitled to it. Discussing “ means a very different thing among different classes of people, and “ I did not know the meaning of the words, and therefore I paid in “ entire ignorance of the law. I knew all the facts, and there “ was no fraud practised upon me. I was told I paid at my “ peril; but I thought I ran no risk in paying, and I thought I “ was bound to pay, having set my name to the paper.” Such would be the defence always set up. Then are we in each par-

Sept. 17, 1881. Particular instance to measure and gauge the knowledge of law which an individual has? and having got at that knowledge are we to gauge his capacity to make the law apply to facts? because you must consider each person, under this doctrine, as you would a lawyer, and you must consider how far he has that which was said to be the talent of a lawyer by civilians; *practicus habitus applicandi leges casibus obvenientibus*. He says, "I know the law, but I could not apply the law to the facts in my own case, and therefore I made the same mistake which many a lawyer had done before me; and though I knew the law, yet not having the faculty of applying it to the facts of my own case, I paid the money, which you now clearly show me that I ought not to have paid; therefore I am entitled to *condictio indebiti*, for the Judges have said, in Carrick's case, that it is quite immaterial whether it is ignorance of the law or of the fact." Now these absurdities are so gross that it forces the admission that there must be some qualification, but I have not been able to ascertain what that is. Is it to be *communis error*; that is to say, that all mankind thought the law to be so till it was set right by subsequent decision, or a declaratory Act of Parliament, and that whatever is done under that impression is to be considered invalid? But that clearly will not cover this case; for there was here no common error. There was a decision in the Court below, and that was afterwards reversed here; but it cannot be said to be a case of universal error, nor is it a case in which the law was changed by a declaratory act, or by what has been called judge-made law, that is to say, a judicial interpretation, affixed either to a part of the common law or to a part of the statute law. That cannot be said to be the limit of the proposition, because a thousand cases may be put, and among others this very case of Carrick, in which it was said, that even though he had known that the time had elapsed, still, if he was ignorant of the law, he was entitled to the *condictio*, it being immaterial whether it was the fact he did not know, or the law he knew not. Now I apprehend it is from a view of all these inconveniences, and the interminable mischief that would arise from allowing that defence to be set up, and the impossibility of affixing such a qualification to the proposition of ignorance of the law being a sufficient objection, that our Courts here have uniformly laid down the rule, according to the case which has been referred to of *Bilbie v. Lumley*, and that case in 2d East which I have referred to since the argument began. The old case of *Lowrie v. Bowdieu* is the main case; but it appears never, in Westminster Hall, to have undergone any great contention. Though it was at one time rather doubted, it never was denied, nor is there any good decision, except a dictum which has been referred to at *nisi prius*, that can be said to

Sept. 17, 1831.

be an authority against the doctrine. It is in the nature of what you would call an exception of estoppel, that a man shall not be heard to say he does not know the law, inasmuch as if you allow him to say he does not know the law you have no certain rule whereby to ascertain whether he knows it or not ; you have no means of knowing whether it is a *bonâ fide* defence, or a defence in *pessimâ fide* ; and you have no such hold over persons as you have where the only question is as to their ignorance of the fact. It is subject to this important qualification no doubt, that if I allow a man to pay me money, I, knowing that he is ignorant of the law, and knowing that he would not pay the money if he were not ignorant of the law, and I myself knowing the law, and being accessory to getting him to pay, or getting some person to misinform him of the law, and then getting payment from him under that superinduced ignorance—it is clear in that case it would not avail me, and that the money may be taken back by an action for money had and received. It has been doubted whether in that case a bill in equity would not lie. There is a case in *1st Peere Williams* which has been much discussed lately in the Court of Chancery, in which a suit of that sort was brought for the repayment of the money ; but Courts of Equity are justly inclined against the doctrine. However, it is clear the money which is so obtained by fraud may be recovered back at law ; but that is quite a different case. Now is there any great hardship in this conclusion ? Is it not the same principle upon which the whole doctrine respecting *ignorantia juris* in criminal cases is founded ? Can it be said to be a much harder case for a party to be bound by what he does *quoad civilem effectum*, that is, to lose his money, than it is that he should be bound *quoad criminalem effectum*, that is, to lose his liberty and his life ? And yet no man can be allowed, in answer to a criminal charge, to get up and say, I did not know the law. You are bound to know it, or, which is the same thing, you shall be treated as if you did know it. Cases no doubt might be enumerated in which the most grievous hardship may have arisen, such as to give the party a claim to the mercy of the Crown ; for example, Lord Ellenborough's act, by which what had before been a misdemeanor was made a capital felony, was to take effect within a week, and therefore before it would be known in the county of Kerry, a part of the kingdom where perhaps it was very likely to be wanted ; and yet under those circumstances a man might indeed have said, I live in the county of Kerry, and I did not know that the act had passed, but he would notwithstanding have been liable to be convicted, and he would not have been heard to say that he did not know the law. Many laws are not known to the persons who are most the subjects of criminal jurisprudence, namely, the

Sept. 17, 1831. inferior classes of the community; they are the least likely to know of a law that has been passed, but they are never allowed to say that they did not know it. Now why is this? Not that there is not a great hardship; not that there is not a manifest natural equity in allowing them to urge this plea; but it is not even allowed to be urged in mitigation of punishment, much less as a defence to the prosecution, on account of the interminable confusion and the innumerable mischiefs that would arise if you opened the door to any such defence. But are there not mischiefs of the same kind applicable to civil jurisprudence, similar and parallel to the mischiefs in criminal jurisprudence? There are the mischiefs that have been pointed out, and with reference to which our Courts have held, that the same principle applies, not, as Mr. Justice Chambre argues, in the last case on the point, upon the ground that *ignorantia juris non excusat*, which is the principle as applied to criminal cases, but it is this, that nobody shall be allowed to say he does not know the law, because the lawgiver can only proceed and judge upon one assumption, that the law is known to the community, and that he is dealing with persons in every case who are cognizant of the law; that the law *may* be known to every person, and that, therefore, it is not unreasonable to presume that it is known to every person. But he cannot presume the fact to be known to every person. On the contrary, ignorance of the fact is almost a necessary occurrence in many cases; and therefore, though the law may be presumed to be known, the fact cannot be presumed to be known. Upon these grounds, I cannot conceive how, in any country where many transactions and dealings are carried on between man and man, and where many law suits arise, any system of law can exist or can be conveniently administered if it is not to be maintained in this way. My Lords, I have disposed of the case of Carrick; but there is also the case of Stirling, of which the whole report is "*condictio indebiti* sustained to "one who had paid *errore juris*." Now this is certainly as meagre a case as I ever heard cited, and for aught I know, if the facts came to be looked into, it might not bear out this conclusion attempted to be drawn from it. It is a case which has very little weight with me. As to the authority of Erskine, when a principle is manifestly dangerous, and one which cannot be followed without grievous abuses, which no limitations that can be assigned to it are in the least likely to prevent, it would require even stronger authority than his to induce me to follow such a principle. But truly, if what is contended for be the undoubted law, it is a marvellous thing that there should be no other cases in support of it. If our forefathers had considered it the law, it is odd that it should never be distinctly set up; because ignorance of law is much more common than igno-

Sept. 17, 1831.

rance of fact. A poor man is more likely to pay money under an ignorance of the law than under ignorance of the fact, inasmuch as a common man is likely to know the facts of his case, but he may easily not know the law. Such a person might very likely pay money under ignorance of the law, and he would very naturally say to his attorney, I have paid the money to such a person, and his attorney would say, You were not bound to pay it, and you have only to bring an action to recover it back. Therefore it is extraordinary that no actions have been founded upon that state of facts, which is much more likely to have given rise to such payments, and therefore to have given rise to these actions, than the other case, the only one in which actions have arisen, namely, ignorance of the fact. It is very marvellous that there is hardly any such thing to be found as an action founded upon a payment made under a mistake of law, and it tends to make me greatly question its being the law of Scotland, as it is now contended to be. No doubt one feels a great disinclination to state any opinion which goes against a high authority; but it is a great comfort to find, that when I look at the facts of this case there are so many specialties in it as make it possible to dispose of it without distinctly and specially deciding this point. As to the plea of *res judicata*, that is not tenable. As to homologation, there is no pretence for talking of it, because homologation is by a person who does one act which recognizes the validity of another act, and in doing which he makes use of the other act. Here there is nothing like that. There is no homologation of the act of payment in question. But as to acquiescence the case is very strong. Now, with reference to the question between these parties before this House upon a former occasion, though I am bound to entertain great respect for your Lordships judgments, I might entertain some doubts about that case if it were now here for decision, and I think at least it will be admitted that it goes very far—as far as Mr. Dixon had any title to claim upon the facts of the case. He brought his action for monies paid by him between 1815 and 1819, and the Court ordered those monies to be paid back. Why did he not, at the same time that he set up the liability of the other party to pay from 1814 to 1819, go from 1815 backwards to 1804, and ask for those eleven years as well as the four years which he did claim? Is not the present in the nature of a stale demand? Is not this one of those demands which are exceedingly discouraged, even in a Court of law, but which in a Court of equity lie under the greatest discredit, and are received with the utmost difficulty? Is not this lying-by injurious to the other party? Is it not preventing him, by giving him no notice, from doing that which if he had had notice in all probability he would have

Sept. 17, 1831. done? Therefore, independently of the proposition that there was here a perfect knowledge of the fact, and that ignorance of the law is all that can be pleaded, are not these special circumstances sufficient of themselves to make the ground, as they were made the ground, of the decision, and the final decision which was pronounced below? Upon the whole, I cannot advise your Lordships to carry the judgment in the former case between Dixon and the Company one whole or one half year further back than the year 1815. It is true there is no statute of limitations relied upon; it is true there is no rule of limitation to exclude the claim; and it is true, undeniably, that by the law of Scotland a man may come at the end of forty years, as if it were only forty days, for the repayment of money paid under ignorance. At the same time the Court will always be very astute to take hold of any means of defeating stale claims, when they can do it without violating any established principles of law. Upon these grounds I shall submit to your Lordships that this decree should be affirmed, and, under the peculiar circumstances of this case, I feel no disposition to affirm this decision with costs, or to give the costs in the Court below. With respect to the cross appeal, there may be some doubt as to costs. If there ought to have been no cross appeal, it may be a question whether the present appellants and respondents in the cross appeal ought not to have their costs in the cross appeal. But on the whole, in moving your Lordships to affirm the decree, I shall not move your Lordships that costs shall be given in either case.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—3 Ersk. 3, 93; 1 Bank. 8, 23, 28; Stirling, 26th July 1733 (M. 2930); Carrick, 5th Aug. 1778 (Mor. 2931); Act 1790; Bone Weavers of Ayr, Digest L. 12. to Sect. 1; 1 Stair, 7, 9; 3 Ersk. 3, 54.

Respondents' Authorities.—Haldane, 11th Dec. 1814 (Mor. Ap. 1, B. and Mal. Fides No. 3); Jackson, 5th July 1811 (F. C. xvi. 318, No. 94); Duke of Roxburghe, 17th Feb. 1815 (F. C. xviii. 227, No. 59); Turner, 3d March 1820 (Fac. Coll. xx. 118, No. 31); Vans Agnew, 19th May 1826 (4 S. D. 604); Bilbie, 2 East, 469; Farmer, 2 Black. Rep. 824; Mann, 4 Term Rep. 561; Lothian, 3 Bos. and Puller, 520; Jerny, 3 Maule and Selw. 378; Stevens, 12 East, 38; Brisbane, 5 Taunton, 143; Shyrink, 4 Barn. & Cres. 281; Act 1790 and 1770; Wilson, 7th Dec. 1830 (4 W. S. 398); Smyth v. Pentland, 20th May 1809; Buller's Nisi Prius, p. 236; Gregory, 3 Espinasse, p. 113.

SPOTTISWOODE and ROBERTSON, — RICHARDSON and CONNELL,
— Solicitors.

JAMES HUNTER, (ROUGHEAD'S Trustee,) Appellant. —
Dr. Lushington.—Mr. Rutherford.

No. 86.

ISOBEL DICKSON, Respondent.—Lord Advocate (Jeffrey)—
Patton.

Husband and wife.—A husband and wife having executed a contract of separation and aliment, whereby the husband bound himself to pay to his wife during her life and separation an annuity of 30*l.* per annum, in consideration of which she renounced all legal claims against him; and the husband having died while the contract of separation was unrevoked, held (affirming the judgment of the Court of Session), that the wife was not bound by that contract of separation, but was, on his death, entitled to her legal provision as his widow, the annuity not being fair, onerous, and adequate, in the pecuniary circumstances of the husband.

ISOBEL Dickson was married in 1814 to James Roughead, Sept. 19, 1831.
 tenant in Jerdanfield, and resided with him until April 1815,
 when, not living happily together, they executed contract of
 separation and aliment. By this deed Roughead bound him-
 self “ to make payment to the said Isobel Dickson of the
 “ sum of 30*l.* sterling during the said Isobel Dickson’s life
 “ and the continuance of the present separation, but declaring
 “ that the said annual payment shall be in full of all claim
 “ which she, the said Isobel Dickson, has or might have had
 “ right to from or against the said James Roughead, or his
 “ means and estate, either in virtue of her *jus relictæ*, or any
 “ other right or privilege, though not here enumerated, to
 “ which a lawful wife is entitled by law or otherwise.”

1st Division.
 L. Meadowbank.

On the other hand, she bound herself to live separate from him during her life, and “ accept of the said sum of 30*l.* “ sterling, settled on her in manner foresaid, in full of “ all claim for separate aliment, board, clothes, or other ne- “ cessaries and expenses of all kinds, which she can or might “ demand by law from the said James Roughead, or his “ means and effects, or can or might claim from his heirs, “ &c., either in virtue of her *jus relictæ*, or in virtue of any “ other right or privilege to which a lawful wife is entitled by “ law or otherwise; all which rights and privileges she, the “ said Isobel Dickson, hereby renounces for ever.”

Sept. 19, 1831.

Two professional men were consulted about the deed, and the draft of it was revised by the wife and her brother, a farmer. On averaging the amount of the aliment, no state of funds was exhibited, but the husband said he could not make the provision large, and his farm was alleged to be at that time a losing concern. He was, however, possessed of visible means, and he had expectations from rich relations. In 1822 he succeeded to 5,143*l.* from a brother, and when he died in 1824 his whole funds (his own and what his brother had left him) were about 8,696*l.* It subsequently appeared that at the date of the separation his own free funds had, in fact, amounted to 2,711*l.*, of which 1,200*l.* was invested in heritable security. He left no lawful children, but conveyed his whole effects to Hunter and others, as trustees, for the purpose of dividing his free residue among his grand-children by a natural daughter. At his death his wife was enjoying her stipulated aliment, and living separate, under the subsisting contract of separation.

Isobel Dickson raised an action against Hunter, her husband's trustee, claiming her terce and *jus relictæ*, and, in support of her claim, she contended, that the deed of separation only regulated the rights of parties during separation, and was revocable *quoad ultra* as a donation *inter virum et uxorem*; and that, at all events, she was entitled to redress on the ground that a provision of 30*l.* per ann. was not a fair and reasonable allowance for the widow of a person who had died leaving nearly 9,000*l.* The trustee, in defence, founded on the pursuer's express renunciation of her legal rights, and maintained the irrevocability at any time of the contract, either as to the separation or the settlement of the interests, subsequent to the dissolution of the marriage; and that, even if the contract could have been recalled during the subsistence of the marriage, yet, having been acted on to the last moment, it could not, on the dissolution of the marriage, be revoked; and, that at the date of the contract, the aliment was adequate in comparison to the then actual state of the husband's funds. The Lord Ordinary ordered cases, on advising which, on the report of the Lord Ordinary, the Court (Feb. 1, 1827) found, "That the pursuer is not bound by the contract of separation within mentioned, and repel the defence founded thereon, and find that

“ she is entitled to her legal provisions as the widow of James Sept. 19, 1831.
“ Roughton deceased, remit to the Lord Ordinary to hear
“ parties, and to decide upon the amount of these provisions,
“ and to proceed further in the cause as accords.”*

Several other interlocutors followed, having reference to the amount of the claims, which were ultimately settled at —£.

Hunter appealed.

1. The contract of separation could not be elided by exception; it could only be taken out of the way by action of reduction.

2. The separation could not have been put uncited to except during coverture, for the party revoking must offer to adhere.

3. Even if revocation were competent after dissolution of the marriage, the respondent must show inadequacy in the provision; and that inadequacy must be struck, not according to the state of the husband's means and effects at his death, but at the date of the contract of separation.

Respondent.—1. The contract of separation is not challenged on the head of fraud, but inadequacy. The remedy, therefore, is clearly by exception.

2. If a provision to the wife be inadequate, the contract by which it was given to her can be revoked, notwithstanding the determination of the husband's life.

3. There was a gross inadequacy, and the period of ascertaining that fact is not limited to the date of the contract. At any time during the subsistence of the marriage the wife could have been relieved against the wrong done her. She has that remedy after his death. In law, the influence supposed to be possessed by the husband, and which may have induced or obliged the wife to accept an insufficient provision, will be presumed to have prevented her from vindicating her rights while he lived, and that influence prevailed.

* 5 Shaw and Dunlop, p. 266.

Sept. 19, 1881.

Lord Chancellor.—My Lords, in applying the Scotch law (which, as it appears to me, is not doubted or disputed on either side in argument,) to the facts in question between this widow and the trustee of her deceased husband, we may admit, that if on the ground of fraud (*dolus in substantialibus*), fraud having given rise to the contract, the arrangement between these married persons had been sought to be set aside, this ought to have been done by an action framed for the purpose, and suited to accomplish the object of the party; and that is a principal and substantive ground which was urged by the trustee in defence of the claim of the woman to her legal rights. But although fraud cannot be taken as the principal and substantial ground, inadequacy of consideration can, in the mode adopted, be brought competently within the cognizance of the Court, and made the ground of their decision. The reason why inadequacy of consideration may be made a ground of exception (as is the case here), supposing the contract is set up against the claim of the widow, without an action to reduce the instrument, appears to me to be, that donations between husband and wife during coverture are in their nature revocable by either party at any time, even by an instrument to operate after the coverture is determined; and where a contract has been made (for instance, for separation and a release of legal rights,) on a consideration which is grossly or glaringly inadequate, that contract, at least *quoad excessum*, is to be taken as gratuitous, and as falling within the principle that a *donatio inter virum et uxorem* is revocable by either party. It has been said, the contract of separation cannot be put an end to except during coverture; for, in order to put an end to that coverture, the party seeking to revoke must also tender himself or herself to the matrimonial duties by offering to adhere. No doubt, while the marriage subsists, that is perfectly undeniable as regards the contract of separation;—it cannot be determined unless in that manner and on that condition. But it is impossible to deny, on the authority of the cases to which we are referred, that revocation is competent after the coverture is determined, where the consideration is unequal. Even in the strongest case for the construction on the part of the appellants with which I am now dealing, the case of *Palmer v. Bonnar*, which deserves the greatest attention, because not only had it undergone much argument at the bar and upon the bench, but principally because among the majority who gave that judgment is to be found the venerable name of the late Lord President Blair, where the question was raised as to revocation after the decease of one of the parties had determined the contract, it was assumed by the Court and the President that if the consideration was grossly inadequate (which is the phrase), then the contract is revocable,

notwithstanding the determination of the life ; and your Lordships ^{Sept. 19, 1831.} will find nearly the same doctrine running through the cases which bear on this view of the matter.

Then, my Lords, the question reduces itself to one of fact—the inadequacy. But in order to ascertain whether there is inadequacy of consideration, another question, and that of law and not of fact, is to be determined, namely, whether the consideration given by the one party, in respect to and in comparison with the rights surrendered by the other, is to be compared with the amount and value of those rights at the date of the contract executed, or at the determination of the matrimonial contract, that is to say, at the death of the husband. I was at first inclined to think, on general principles (for no doubt in other cases it would be so), that the comparison of the consideration with the value given up was to be taken at the date of the contract, and not at any subsequent time ; but I am satisfied now by the case decided on the authority of the Lord Justice-Clerk, and that recent case not dissented from by his brethren, and I am still more satisfied from the reason of the thing, that there is a peculiarity in the irrevocable nature of the marriage contract, and that in those donations you are, upon the plainest principle, to regard not merely the date of the contract, but also the last period (at which it is admitted on the other hand the donation or contract of separation, with all its incidents and consequences, may have been validly put an end to,) namely, the decease of the husband. Because, if the contract is clearly revocable *stante matrimonio* up to the last hour of marriage, may we not, as the Court seems to have done in that case last cited in 1729, most fairly and consistently, and on the very principle of its revocable nature, assume, that as long as it continues unrevoked, it is to be regarded, not as a contract executed and finally concluded at the period from which it is agreed to be performed, but as a contract going on from day to day, inasmuch as either party might determine it at a moment's warning ; it is so said by Erskine, impliedly, as well as expressly ? Is it not to be taken as a contract perpetually renewing, to which the parties are perpetually giving their assent by their silence, and by not revoking it, just as they might at any moment, if they choose to revoke it, either expressly or tacitly, either by a deed of revocation or by notice to the party amounting to an express revocation, or by doing some other thing manifestly inconsistent with the duty imposed by the contract ? If so, we are to take the respondent as standing in this situation. She might at any moment have given notice to revoke—(and so might the husband to the wife)—she might have gone up to the death-bed of her husband, and have said, “ I am willing to adhere ; let there be an end

Sept. 19, 1891. "of this contract." If she abstained from doing so, it was from a regard to the state of circumstances at the death of her husband, just as much as she had already done at the date of executing the contract. Then is not that state of his circumstances, in comparison with the consideration which she receives for her release of all her legal rights under the marriage contract, to be taken, not merely with a view to the date of the contract itself, when she may have been supposed to have compared them together, but also with a view to the death of her husband, inasmuch as she had a clear and unquestioned right to take them into consideration, and if she chose upon that consideration, to determine the separation in that contract? She no doubt did not take them into her sufficient consideration; she no doubt, either from fear that her husband might require her to adhere and come back again, or for some other reason, (so the law presumes, which has made so great an exception of this from all other contracts,) did not take into her consideration that inadequacy; but it is to protect her against that very want of consideration that the provisions of the law are intended—to protect against undue influence and blandishments—to protect the husband against the wife's blandishments, and to protect the wife from the husband's tyranny or his influence. Seeing that there is a consideration which is inadequate, the law will raise a presumption that the influence was in point of fact exercised, and therefore that the contract was unrevoked under the influence, and so not binding. For these reasons I strongly incline to agree with the view, that the time when you are to compare the husband's circumstances with the annuity he gave to his wife is not the time when it is admitted he had 2,700*l.*, 1,200*l.* of which was invested in heritable security, out of which she would have had a third for her life, or when, taking it at 2,700*l.*, she would have had (there being no children) a right to half the amount, say 1,350*l.*, but the time when it had amounted (by the decease of his brother) to somewhere about 8,000*l.*, and when consequently her share was increased to 4,000*l.* Now, is it not a grossly inadequate consideration for abandoning this claim that he should have given her 30*l.*? I say it is a consideration of the most glaring inadequacy, as regards the 8,000*l.*, at the period when you ought to take the computation. I do not know whether the Court of Session took it at the one period or the other, except as I may presume from a former case, which seems to be similar, as far as the statement of the Lord Justice-Clerk goes; but I think this woman giving (the man being at a very advanced period of life) the half of 2,700*l.* for the annuity of 30*l.* a year was inadequate, and glaringly inadequate, even if you take the date of the execution of the contract to be the period of comparison. It is

true, that if a better security had been given, 30*l.* might have been more adequate, and it is equally certain that the husband might have put away his fund, so as to avoid her *jus relictæ* effectually. But there is no such thing here. It is plain that the woman was just as uncertain, and exposed to just as great a risk, in getting the 30*l.* as she would have been if she had not made the contract, and retained her right to the moiety of the 2,700*l.* or of the 8,000*l.* There was no better security—no money was vested in trustees. If there were creditors, she was exposed to the risk of being prevented from competing with them at all; and at all events, if he were a bankrupt, she would only get so many shillings in the pound for her 30*l.* as would be her proportion with other creditors. On these grounds it appears to me that the Court of Session decided this case rightly.

With respect to the other point, the alleged concealment of the funds of the husband at the time the contract was entered into,—which rather goes to the question of costs,—though a bad reason may have been given for the judgment, yet, if there is a good reason, that is no ground for reversing. In the view I take of this case, thinking there is not a competent consideration, I think the Court came to a right decision. Indeed I greatly doubt whether the alleged concealment was made a substantive ground, or whether it was not dealt with as rather illustrating the inequality of the provision, and showing that it was grossly unequal, and that she would never have thought of entering into it if she had had a thorough knowledge of his circumstances; it is merely found in the learned reporter's note.* We are in want of every thing that would give distinct and clear information as to the grounds on which that judgment was pronounced,—we have not a single statement of what any one said; but it did not probably enter into the minds of the learned Judges in disposing of the question, from finding it very little urged by the parties; it is scarce mentioned by one party, and not at all by the other. Upon those grounds I am disposed to move your Lordships that the interlocutor here be affirmed; but taking the whole of the circumstances into consideration, I am not inclined to think that any costs should be given.

* The note was as follows: —“ The Judges were of opinion, that as no statement of
 “ Roughead's funds had been exhibited at the date of the contract, as the annuity
 “ was not a fair and adequate provision, and as no security had been granted even for
 “ that small provision, it could not be considered as truly onerous, and therefore
 “ it was not binding on the pursuer to the effect of preventing her from revoking
 “ it, and claiming her legal provision.” 5 Shaw and Dunlop, p. 267.

Sept. 19, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Gib. 14th March 1634 (Mor. Dec. 6116); M'Gregor, 22d Jan. 1820 (F. C. xx. 86. No. 18).

Respondent's Authorities.—M'Diarmid, 17th May 1826 (4 S.D. 581); Hardie, 12 Feb. 1823 (2 S.D. 213;); 1 Bell's Com. p. 648, 5th edit.; Palmer v. Bonnar, 25th Jan. 1810 (F.C.); Gaywood, 3d June 1828 (6 S.D. 909); 1 Ersk. 6, 18; 1 Bank. 5, 99; Earl of Eglinton ——— (Mor. Dec. 6151); Crammond, 4th Jan. 1757 (Mor. 6157); Lawson, 28th Nov. 1797 (Mor. 6157); Scott and others, 10th Aug. 1776 (Mor. 6108); M'Gillan, 22d Dec. 1758 (—); Stewart, 22d Nov. 1769 (Mor. 6100).

SPOTTISWOODE and ROBERTSON,—JOHN M'QUEEN,—
Solicitors.

No. 37.

WILLIAM M'DONALD of St. Martins, Appellant.

MACKIE AND COMPANY, Respondents.—*Dr. Lushington.*

Process—Reparation.—A person raised an action against tradesmen employed by him to furnish pipes for supplying his house with water, concluding for repayment of the sums paid to account of the price, and for damages in respect of the insufficiency of the work; held (reversing the judgment of the Court of Session), that having stated the facts on which he founded in his summons and condescendence, which the defenders fully and explicitly answered, it was too late thereafter to deny the relevancy of the facts condescended on, and therefore the case remitted to the Court of Session, with instructions to direct an issue to be framed to try the question.

Sept. 21, 1831.

2D DIVISION.
Lord Medwyn.

WILLIAM M'DONALD of St. Martins raised an action against Mackie and Company, plumbers in Perth, setting forth, that wishing to supply his house of St. Martins with water, he contracted with the defenders to execute the work, and furnish pipes for the same, of proper materials, and in a sufficient and workmanlike manner; that the defenders, having thus undertaken the work, proceeded in the execution of it; and that every thing was done exclusively under the direction of them or their workmen; that their operations being completed, it was discovered that the pipes laid by them were totally inefficient for the purpose which had been in view; that at no time

did they furnish a sufficient supply for the pursuer's house, Sept. 21, 1831. although there was no want of water at the fountain-head; and that on many occasions, and for long periods of time, they ceased to work at all, and the pursuer's family were left wholly without water, except such as they were forced to procure by other means; that, after repeated complaints, the defenders endeavoured to account for the failure of their work by attributing it to the want of fall or descent from the fountain-head to the house; but even had this been the case the blame would still entirely have lain with them, for the fountain was built and a cut made in the line and direction pointed out and ordered by themselves or their foreman; that various attempts were made, or pretended to be made, by the defenders, to remedy the defects and inefficiency of their first work, and they from time to time amused the pursuer with the strongest assurances that every thing would yet do well; in consequence of which they succeeded, not merely in gaining time, but in impetrating payments from the pursuer to account until the price of their work was nearly paid up; that subsequent to this the pursuer could not get the defenders to do any thing; and they having at last declared that they could do nothing further to remedy the evil, and that the pursuer might employ whom he pleased. He ultimately was obliged to call in another tradesman, when it was discovered that the pipes laid by the defenders were of insufficient materials and bad quality; that in consequence great part of the water escaped through numerous pores in the metal, and that this, even independently of the unskilfulness displayed by the defenders in the laying of the pipes, was a main cause of the water not coming to the house; that the pursuer insisted that the defenders should remove the defective pipes, and either replace them by others of a sufficient and workmanlike description, making reparation to the pursuer for the damage which he had sustained in the meantime, or, failing their doing so, that the pursuer himself should be entitled to follow out the proper remedies for his own benefit, the defenders relieving him, both for the time past and for the future, of all loss and damage to which their improper and unworkmanlike proceedings had exposed or might expose him; that another workman having stopped with solder the different holes in the pipes, and repaired the air-cocks, and the air having been expelled, the water once more flowed abundantly into the

Sept. 21, 1831. cistern, but from what has been already stated it is evident that this supply may be but temporary; that the pursuer made various payments to account of the work. He therefore concluded—1. For removal of the pipes;—2. For repayment of the 300*l.* paid to account; and, 3. For 200*l.* of damages, &c.

Condescendences and answers were lodged, in which the whole facts on both sides were specially detailed. In the plea of law annexed, the pursuer pleaded, that the defenders were bound, not only to furnish good and sound materials for the work which they undertook to perform, but also to complete that work in a proper, sufficient, and workmanlike manner; and having failed in both or one or other of these particulars, they were liable in damages, and to repair the loss, injury, and inconvenience which he had sustained or might sustain, either through the original defects in the materials furnished, or in consequence of the negligent or unskilful manner in which the work was performed. The defenders, on the other hand, pleaded—1. That the pursuer's case, as contained in his summons, and still more as explained in his condescendence, was irrelevant to support the conclusions of the summons; and, 2. That the pursuer was precluded from insisting in all or any of the conclusions, not only by his having made payments to the defenders to such an amount during the progress and after the completion of the contract between the parties, but even more strongly by his subsequent transactions with another workman, and by that person's interference with the defenders' workmanship, without either their consent or the authority of a court of law.

The Court, (9th March 1830,) found, “that in the special
“circumstances set forth in the summons and other pleadings of
“the pursuer, there is no relevant ground for a claim of damages
“against the defenders, which ought to be remitted to the Jury
“Court: Sustain the defences; assoilzie from the conclusions of
“the summons, and decern: Find expenses due to the defenders,
“the account to be given in, taxed, and reported on in common
“form.”*

* *Lord Cringletie* observed, I do not see any thing that can be sent to a jury. It is not averred that Mackie and Company agreed to bring water into the house, or to construct fountains, but only to lay pipes; and all I see stated distinctly is, that a few feet near the fountain were insufficient, which were taken up by another tradesman without warning them to attend. Before touching them, the pursuer should have

M'Donald appealed.

Sept. 21, 1831.

Appellant.—Independent of and in addition to the plea in law maintained in the Court below, it is plain, that if the appellant's statement on the record be true, the judgment of the Court below, assoilzieing the respondents, is untenable; and the appellant being prepared and having offered to establish its truth by competent evidence, the justice of the case entitled him to be let into such proof, and the Court ought, as in other questions where there is disputed matter of fact, to have remitted the cause for trial in the Jury Court. It is indisputable that the time is past for demurring, if a full and explicit answer has been put in, of facts amounting either to a plea of general issue, or to some special pleas other than general issue.

The *Respondents* urged the same reasons as in the Court below, and denied, as applicable to the question, the rule of pleading stated by the appellant.

Lord Chancellor.—My Lords, it appears to me, that notwithstanding all the natural advantages of jury trial, instead of it being

sent for these gentlemen to see them opened, and that they were fairly managed. The whole loss is from his being his own engineer.

Lord Pitmilley.—This case is attended with several important specialties. If it were an action for breach of contract, we could only have allowed a proof; but this is a different case, and I am inclined to concur. For what did the defenders undertake? Only to furnish a certain quantity of pipe, but nothing as to the reservoir. It is evidently necessary that the pipes must have been proved before they were laid; but, after they were laid without objection, it is too late to complain; and this alone is sufficient to exclude the claim. But there is a great deal more. Instead of taking up the pipes at the sight of the defenders, the pursuer employed another person to do it out of their sight. Then, what are the conclusions of the summons? To take up the pipes, and repay the money, with a subordinate conclusion for damages. I think all claim is now excluded, first by acceptance of the pipes, and payment of the price; and, second, by employing another tradesman, at the back of the defenders, to lift and relay the pipes.

Lord Justice-Clerk.—I have little to add, as I agree with your Lordships that nothing remains which can be made the subject of issue. The conclusion for taking up the pipes is now given up, as it is admitted there is now a good supply, and the pursuer substantially confines his claim to the conclusion for damages, as a solatium for the want of a proper supply for two years; and though the case were free from specialties, I would scarcely consider it relevant; but the specialties are quite sufficient to exclude the claim. The pursuer should have called the workman himself to lift the pipes; or, if he refused, he should have applied to judicial authority, and have obtained the appointment of a neutral man; and, besides, the whole price was paid in the very years when the supply was deficient.—8 Shaw and Dunlop, p. 686.

Sept. 21, 1831. a blessing to the inhabitants of Scotland, they will, on the contrary, have to curse us for the gift if it is to be so dispensed, and if the system of the Courts auxiliary to the jury process is to be so administered, as it appears to have been in this case; for here, instead of having at once a short answer, admitting or denying the fact alleged in the summons and condescendence, the parties have gone into all the statements of the case on both sides. Not only has the plaintiff stated that there was a contract made, and that the contract was broken to his damage, which is all that he ought to have done, and not only has the other party said that the contract was not made, and if made was not broken, and then left it to the Court to try the fact thus put in issue, but another and very different course has been taken, namely, that of the pursuer alleging every one particular fact and circumstance which ought to have been made the evidence to support his averment. He has averred his whole evidence by pleading in the course of the summons and condescendence (both argumentative too from the beginning to the end); and the defender, on the other hand, has pleaded every one circumstance of evidence, every one matter of fact from which a conclusion might be drawn, either directly or by implication, impeaching the claim of the plaintiff. Then the whole of these matters being before the Court, it never seems to have occurred to their Lordships that it was too late to deny their relevancy, which is the office of a demurrer to the declaration, and that by answering and entering fully into the whole of this matter the defendants admitted that the declaration contained a relevant charge against them. Their Lordships, on the contrary, after this explicit answer to so explicit a statement of the case, take up a demurrer, and they say, admitting all this answer to be out of the case, admitting all the facts to be true as alleged in the pursuer's statement, yet there is nothing here which gives the pursuer a claim against the defenders; but their Lordships, though they at first appear to take this course—though I say they affect to take that course, (which it was too late for them to take) they clearly do not take it for any one moment in the progress of their argument; for they no sooner begin arguing whether, admitting these to be the facts, any claim lies against the defenders, than they instantly fly off from that, and take from the answer matter of defence, by way of showing that it is not likely the facts should be as stated by the pursuer. A greater confusion could not possibly be made. I speak it with all possible respect; for it is not the fault of the learned persons who have fallen into this most inconsistent course, but it is the fault of the system under which they have been so long accustomed to act, and which has induced the inveterate habit of confounding the fact with the law. Now the keeping fact and law asunder is one of the great advantages of jury trial in England; and

the office of juror and the office of judge being kept distinct, it is the great duty of the pleader to be ancillary to the maintenance of that distinction, so as to make it impossible that the two shall ever be confounded. My Lords, if I had desired an instance of the most flagrant description to show the great advantages of our system of pleading, and of our system of jury trial, I should have taken the case now before your Lordships as furnishing exactly such an instance; for it appears that the course has here been mistaken from the beginning to the end of the cause. In the first place, their Lordships have mistaken the shape in which it was brought forward; secondly, they have mistaken their office, in dealing with the answer and the condescendence at that stage; and, last of all, even if they had been right in the period of time of so dealing with it, if it had been a motion in arrest of judgment, or a motion for entering up judgment *non obstante veredicto*, or an argument upon demurrer, yet, in the third place, they have confounded two utterly distinct subjects of consideration, namely, the question of law, whether or not the pursuer's averment amounted to a claim in law, and the question of fact, whether this averment was true or not. Sept. 21, 1831.

My Lords, having thrown out these general observations, I shall say one word, as I am about to move your Lordships to reverse the interlocutor, in explanation of the particular manner in which the miscarriage has occurred. The contract is most inartificially pleaded; it is most imperfectly set forth. Taking the whole of the summons, with the revised condescendence and the re-revised condescendence, it is not easy to say precisely how far the contract went, and what obligation by force of it was imposed upon the defenders; therefore it remains somewhat doubtful upon the face of these pleadings whether the defenders undertook to do more than furnish lead pipes. If I were to state the inclination of my opinion from the first part of the summons, I should be inclined to say that they did undertake to do more than furnish pipes; for there is some ground for saying that they undertook to lay the pipes, that is, so as to enable the pipes to carry water, (when I say that they undertook, I do not mean in point of fact, but as to what it is alleged they undertook). I am inclined to think that there is some allegation in the first part of the summons of their having so done. If so, there is an end of the question; but I say, put that out of the case, and suppose that there is no such averment, one thing is quite clear, that they undertook to furnish pipes, by which M'Donald avers most distinctly (and he is right in averring) that they were bound to furnish pipes of sufficient materials to carry water. M'Donald avers that distinctly two or three times over in the part of the pleadings which is said to be a retraction or a departure from his averment, but I look upon it as only a confirmation and re-affirmance

Sept. 21, 1831. of that averment; he says, that those pipes were of insufficient and bad materials; not only that the cock was insufficient, but that even the pipe was insufficient; and he shows how it was insufficient. Then can your Lordships say that there is no right of action because he has not done certain things which it is said he ought to have done? These are very fit matters to go before a jury, and they are very likely to help the pursuer and damage the defenders before a jury; but in this Court and in this form of pleading they have just as little to do with this case as they had with the case last before your Lordships, or with the case that is next to be heard. Therefore I should humbly move your Lordships that these interlocutors be reversed, and that the case be remitted, with instructions to the Jury Court to direct an issue to be prepared which will try the question in proper form by a jury; and I cannot but wish that the rule were adopted in the Court of Session which common sense dictates in every other Court, and which I take to be the true Scotch rule as well as the English, that the time is past for demurring, if a full and explicit answer has been put in, of facts amounting either to a plea of the general issue, or to some special pleas other than general issue, but covering the whole demand and raising a mere question of fact.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

ALEXANDER FRASER—SPOTTISWOODE and ROBERTSON,—
Solicitors.

No. 38. WILLIAM DOWNE GILLON, Appellant.—*Mr. Serjeant Spankie—
Dr. Lushington.*

ARCHIBALD MACKINLAY and others, for the Edinburgh and
Leith Shipping Company, Respondents.—*Mr. J. Campbell
—Mr. Tinney.*

Partnership.—Proof.—What facts and circumstances held (affirming judgment of the Court of Session) sufficient to establish that a party was a partner of a trading company.

Process.—Observations on the mode of pleading in the Scotch Courts.

Sept. 22, 1831.

2D DIVISION.
Ld. M'Kenzie.

WILLIAM DOWNE, proprietor of Downe's Wharf, was one of the original partners of the company of Downe, Bell, and Mitchell, wharfingers, London, in which he held a one third

Sept. 22, 1831.

share, and to which he had granted a lease of the wharf at a rent of 900*l.* per annum. They were, in 1809, appointed agents in London for the Edinburgh and London Shipping Company. Downe had three daughters, married respectively to Charles Read, George Atkins, and Colonel Gillon of Wallhouse. He died in June 1810, leaving a will, whereby he bequeathed the wharf in three shares, one third to each of his daughters respectively in life-rent, and their children in remainder, and he further bequeathed his third of the profits of the business of the company in equal parts to his three sons-in-law. On the 7th of June 1811 a memorandum of agreement was entered into by Read, Atkins, and Forbes, (the last acting for Colonel Gillon,) as joint legatees of Downe on the one part, and Messrs. Bell and Mitchell, the surviving partners of the company, and as such lessees of the wharf, on the other part, whereby it was agreed that a new partnership should be formed, to be held as having commenced at the date of Downe's death, "the parties thereto being Messrs. Bell and Mitchell, each one third, and the said three legatees the remaining third, in equal shares." One of the articles of the agreement stipulated that the rent payable to the legatees for the wharf should be reduced from 900*l.* to 600*l.*, payable in three equal shares; and another provided that "a deed of lease and partnership shall be prepared with all convenient speed, and a copy thereof sent to Scotland for the approbation of Colonel Gillon and of Mr. Bell." On the 8th of June Forbes further made a verbal agreement with Read and Atkins, the co-obligants, which he announced to Colonel Gillon in these terms:—"By a separate unwritten but solemn agreement with the two sons-in-law and executor, I have obtained for you the choice of either continuing the partnership, or accepting, in lieu of one third of rent and one ninth of profits, the net sum of 500*l.* per annum from 30th June last year." With reference to these arrangements, Colonel Gillon, of date the 13th of June, wrote Bell as follows:—"As a pledge has been given by all present for the new agreement then entered into, the covenants of which, I presume, you are made acquainted with, Mr. Forbes proposed for me, that, being at such a distance from London, I should be left at liberty to receive a regular payment annually of 500*l.* in lieu of every thing, or continue

Sept. 22, 1831. “ a partner in the contract, by which I would be entitled to receive one third of the rent of 600*l.* and one ninth of the profits of trade. In this situation of matters I have taken the liberty to request that you will have the goodness to give me your advice upon this subject:—1. Whether to remain as a partner; 2. Or to receive the 500*l.* annually.” Thereafter Colonel Gillon intimated that he would avail himself of the option allowed him by the subordinate verbal agreement entered into with Read and Atkins, and accept the annual payment of 500*l.* These persons, however, refused to abide by this agreement, and after some correspondence an arrangement was effected. Another agreement was entered into (13th May 1813) by Colonel Gillon on the one part, and Read, Atkins, Bell, and Mitchell on the other, whereby it was “ covenanted, stipulated, declared, and agreed, that neither the said Andrew Gillon, or his heirs, executors, administrators, and successors, shall be concerned in, or have any management or control of, the business carried on at Downe’s Wharf under the firm above mentioned. 2. That during the period stipulated as the endurance of said partnership, either in virtue of a minute drawn up and signed at London in the month of June 1811, to which the said Andrew Gillon was (proposed to be) a party, or by any subsequent contract to be subscribed by the said Charles Read, George Atkins, William Bell, and Alexander Mitchell, as the sole partners now composing the firm of Downe, Bell, and Mitchell, they or their successors shall, in consideration of the sum of annuity after mentioned, be entitled to occupy and possess the wharf called Downe’s Wharf, situate in East Smithfield aforesaid, and the buildings thereon, &c., and that without any let, stop, hinderance, or impediment from the said Andrew Gillon or his foresaids. 3. That the aforesaid Downe, Bell, and Mitchell, their executors, administrators, and successors, on the other hand, are and shall be bound and obliged, as they do hereby bind and oblige themselves and their aforesaids, to pay unto the said Andrew Gillon or his aforesaids the sum of 400*l.* sterling per annum, during the space or period above referred to, in full of all that he or they can ask, claim, or demand as heritable proprietor or proprietors of the aforesaid wharf and buildings, or any parts thereof, as particularly described in the second clause of

“ this agreement. 7. That the aforesaid minute of agreement, Sept. 22, 1831.
 “ which was entered into in the month of June 1811, shall cease
 “ and be void in so far as regards the share of the business thereby
 “ (proposed to be) allotted to the said Andrew Gillon, and he
 “ shall not have any interest in or concern with the business of
 “ the said Messrs. Downe, Bell, and Mitchell, or the profits or
 “ losses arising therefrom.”

On this footing matters remained, without, however, any notification to the public; only it did not in fact appear whether the contract above quoted had been acted on, for although Colonel Gillon never in all obtained more than 406*l.* from the company, he was in their books credited with one ninth of the profits.

In 1814 the shipping company withdrew their vessels from the wharf. Downe, Bell, and Mitchell then owed them 843*l.* 8*s.* 3*d.* In June thereafter the shipping company brought an action of count and reckoning against the London company and its individual partners, not including Colonel Gillon, and in this action they obtained decree for the above sum, with expenses; but on becoming acquainted with the above circumstances, they brought, in August 1822, a supplementary action for the amount against him as a partner. On his death this action was transferred against his son, William Downe Gillon, who, in defence, denied that either he or his father was ever a partner of Downe, Bell, and Mitchell. The facts or allegations in the case were fully detailed in revised and re-revised *condescendences* and answers.

The Lord Ordinary (12th November 1829,) found “ it
 “ proved that the defender’s father, Lieutenant Colonel Andrew
 “ Gillon of Wallhouse, was a partner of the company of Downe,
 “ Bell, and Mitchell, wharfingers in London, and that the
 “ defender represents his father; and, before further procedure,
 “ appoints the cause to be enrolled.”

The Court, 30 Nov. 1830, adhered.*

William Downe Gillon appealed.

Lord Chancellor.—My Lords, after fully attending to the facts of this case, as opened for the appellant, if I had felt that there was any

* 9 Shaw and Dunlop, p. 90.

Sept. 22, 1831. thing doubtful upon the evidence whether Colonel Gillon was a partner or not, I should then have been disposed to hear the counsel on the other side, for the purpose of removing that doubt, or of seeing whether they could support, upon other grounds, the decree now under appeal before your Lordships. But as, of course, what may fall from the respondents' counsel can only have the effect of confirming the opinion, which, upon the whole, I am disposed to entertain with very little hesitation, namely, that there was a partnership, and that opinion going along with the decision of the Court below, I think it would be an unnecessary consumption of your Lordships' time if I were to call upon the other learned counsel to address your Lordships. My Lords, it is a very painful circumstance to observe the mass of pleadings with which this case has been encumbered by the unskilful inartificial manner in which this condescendence has been drawn,—the mass of averments on the one side and the general denial upon the other, whereupon, and upon three or four documents, letters, and agreements, the Court have come to a decision upon the question before it. But even of that I would not have so much complained if the Court, seeing that there was any neat issue of fact raised, had, after all, thought proper to cast aside the husk in which it was enveloped, and to say, “Let the whole of this condescendence, now “re-revised, (and which is made worse by that re-revision—made more “prolix, more inartificial, and less like what a pleading of this nature “ought to be than it was at first,) undergo to a fourth stage of pre- “paration—let it be reformed, and by the application of the scissors “let the great bulk of it, all but about two or three lines, be cut off, “and let that remain which is the averment that there was a partner- “ship, and let that fact, if disputed, be tried by a jury.” In all probability, among other effects, this good would have resulted from such a course, that we should not have had the question brought here. My Lords, it really ought to be recollected that the arrears of appeals with which your Lordships were overwhelmed was one of the moving considerations which induced parliament to consent to the great innovation, so much complained of at the time, of introducing jury trial into Scotland, in the hopes that by trying issues of fact the amount of appellate business would be diminished; and not only that your Lordships would have less business to do as a Court of Appeal, and less arrear, therefore, of that business, and less expense and delay to suitors, but, what was perhaps more material still, that a better mode would be established of deciding questions of fact; and that then this house would no longer be placed in the situation of having a mass of evidence brought up before it in the form of what is called in Scotland a proof, and being called upon, without having seen the

Sept. 22, 1831.

witnesses any more than the Court below had seen them, to sit in judgment as a Court of Review upon questions of fact, wrapt up in almost impenetrable confusion. But here we have a case without any proof at all by either party. There is nothing but a mass of averments on the one side, and a denial, more or less general, on the other, and some half-dozen or dozen of documents in the shape of letters ; and then, upon this imperfect probation, you are called upon to sit in judgment still upon the question of fact, for it is merely the question of fact of the partnership which the Court below, in the first instance, have chosen to decide without the intervention of a jury. Now this appeal would have been saved if a jury had tried the cause, and they would have been a much better tribunal for trying this question than either the Court below in the first instance, or your Lordships in the last. Nevertheless, this is not the course taken below. They thought that the evidence was strong enough to supersede the necessity of sending it to a jury, and they have saved nothing to the parties ; on the contrary, they would have saved them a good deal of money and a good deal of time if they had let a jury decide.

Nevertheless, we are now to deal with the appeal ; and the question is, whether, if they had sent the case to a jury, the jury, upon the facts before you, could have drawn any but one conclusion, namely, that there was a partnership ? But I must say a word more on these pleadings, than which I cannot conceive any thing more vexatious, any thing that tends less to the elucidation of truth, or that tends more to involve the question at issue, and to prevent the parties from distinctly seeing what the question between them really is. You see the way a pleader proceeds in Scotland, when he draws a condescendence, is, first of all, to make averments of facts ; but he does not confine himself to make the averment material to the question between the parties, but he instantly tacks to it a statement, by way of averment also, of all the details of the evidence which go to prove that fact which he has first averred. The pursuer here does not say, " I aver that Colonel Gillon was a partner, and I am ready to prove it. You may deny it if you please, and then we shall go to issue. I will establish it in evidence, and you may disprove it if you can." But he says, " I will show that he wrote a letter on such a day, I will show that Forbes did so and so, and I will show that he gave authority to Forbes." That is bad enough, for that is the evidence to prove the averment. But he does not confine himself to that, for he goes into minute particulars, stating how he shall show that Forbes is the agent, and how he is to prove that he did such and such things. Then, among the notable things averred here on the one hand and denied on the other, is, that three actions were tried in the Court of King's Bench, that there was an affidavit in support of the plea of abatement

Sept. 22, 1891. below, and that Forbes, the agent, was sworn as a witness in the King's Bench, and gave his evidence in a certain way before that tribunal. Now, parties ought to be told, that if they will aver evidence instead of averring the propositions of fact which they are to prove by evidence, they ought at least to have the decorum in their pleadings of not averring what every boy who has been a year in an attorney's office, or a month in a special pleader's office, knows cannot be given in evidence. If you had five thousand witnesses who had heard Mr. Forbes examined—if this had been as true an averment as any thing could possibly be, it is utterly immaterial; for if you had five thousand witnesses who were ready to swear it, not one tittle of it could, by the law of the land, have been listened to by any Judge sitting in England or sitting in Scotland. The law of the land is, that this is not evidence, and one is really mortified at seeing the records of a Court polluted by such averments. How can any young man coming to the Scotch Bar, when he sees the Court allow all this without saying a word against it, (for I do not see any application to strike it out of the record,) how can any writer or agent or young conveyancer, copying over these things in the course of learning Scotch law, do otherwise than believe that that is evidence; and I should not be astonished to hear counsel at your Lordships' bar get up a year or two hence and say, "We know that is evidence by the law of Scotland, for did not your Lordships allow it in the case of Gillon?" Therefore, even admitting that it was right, which it was not, to plead matter of evidence, (instead of referring to the evidence, and only pleading your general averment of fact,) if it was right make your whole condescendence a mass of insinuation, implication, and inference, (for this condescendence is argumentative from beginning to end,) yet still you ought only to aver that which is legal evidence—you are not to aver hearsay, which cannot be evidence in any court. Really, my Lords, this tends to unsettle men's notions as to what the law is; and unless some means are taken of checking this endless and boundless laxity of pleading, I can, for my own part, see no end to vexation and litigation, leading not only to great delay and expense, but also to misdecision; because, unless men's minds are applied to a correct and distinct view of the case, they are sure to be led into error. As I had occasion to observe yesterday in the case of M'Donald*, it is in vain you give jury trial to the people of Scotland, as a blessing when it is made the instrument of getting at the truth in an accurate and correct and technical manner, for it will be the instrument of confusion, worse confounded than ever, if this course of pleading (if

* M'Donald v. Mackie and Co., ante, p. 465.

Sept. 22, 1831.

such it can be called) is allowed. My Lords, if this goes on much longer, it will be my bounden duty, occupying the situation I fill, to bring before your Lordships some legislative measure for the purpose of remedying it; for if the Courts below will not themselves, the wisdom of the legislature must be invoked to devise and advise, if not to compel, a proper system of pleading. In the case of M'Donald, the Court below, at a certain stage of the cause, took up a demurrer to the relevancy of the averment, and said, "These facts are totally irrelevant." Why? Because some of them are not true. Really that was the argument. A person was averred to have contracted to supply leaden pipes of proper materials, and in spite of that contract to have furnished pipes that were honey-combed, and of which the lead was bad; and the learned Judges said the averment was quite irrelevant, and there was nothing to send to the jury. They said that one part was irrelevant because there was not a breach of the contract, and that another part was irrelevant because it was clear that it was not true. My Lords, in this case, however much I may regret, for the reasons I have given, that this case did not go before a jury, upon the whole, I think their Lordships have come to a right conclusion in finding that there is a partnership; and as, upon the facts of the case, I see no prospect whatever of a further investigation before a jury displacing the conclusion which these facts have led the Court to, however much I may regret that the other course was not taken, I shall advise your Lordships to affirm the judgment, and with costs.

The House of Lords ordered and adjudged, That the interlocutors be affirmed.

Respondents' Authorities.—Livingston, 17th Jan. 1755 (Mor. 1455); 2 Bell's Com. 506; 1 Montague on Part. p. 4; Grace, 1755 (—); 2 Black. 998 (App. 39); De Grey, c. i.; Hoare v. Dawes, 1780; Dow, 371 (App. 65); Lord Mansfield; Lord Loughborough in Coope v. Eyre, 1 H. Black. 37, 1789 (App. 53); D. Argh.; Waugh, 1793 (—); 2 H. Black.; Bloxham, 7th March 1775; Mont. ii. p. 40, vol. i. pp. 4, 5, and 17.

SPOTTISWOODE and ROBERTSON — MUNDELL, — Solicitors. •

No. 39. WILLIAM BURRIDGE CABELL, Cashier to the Glasgow Bank Company, and others, Appellants.—*Lord Advocate (Jeffrey)*—*D r. Lushington.*

JAMES BROCK, Archibald Newbigging and Co.'s Trustee, Respondent.—*Mr. Rutherford—Mr. Kaye.*

Lease—Right in Security.—A mercantile company in possession of a lease borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; the bank thereupon granted a sub-lease to the company, who remained in possession and paid the rents; and no possession was taken by the bank:—Held, (affirming the judgment of the Court of Session,) in a question with the trustee on the sequestrated estate of the company, (without deciding the general question with respect to the sufficiency of intimation without possession,) that the assignation was not effectual against the creditors.

Sept. 23, 1831.

2D DIVISION.
INNER HOUSE.

This was the sequel of the case reported ante vol. iii. p. 75. The Second Division of the Court of Session (15th Nov. 1821) had found “that, under the whole circumstances of this case, “the assignation founded on cannot be effectual against the “petitioner (respondent), the trustee for the creditors of the “cedents; and therefore, in the suspension, find the letters “orderly proceeded, and decern; and in the declarator decern “and declare in terms of the libel, and find no expenses due, “so far as hitherto incurred.” On appeal, the House of Lords (13th May 1828) “ordered and adjudged, that the cause be “remitted back to the Court of Session in Scotland, to review “generally the interlocutors complained of in the said appeal.” And it was farther “ordered, that the Court to which this “remit is made do require the opinion of the Judges of the “other Division and of the Lords Ordinary on the matters “and questions of law in this case, stated in writing, which “Judges of the other Division and Lords Ordinary are so to “give and communicate the same; and, after so reviewing the “interlocutors complained of, the said Court are to do and decern “in this cause as may be just.”

The cause having thus returned to the Court below, their Lordships ordained the parties to give in cases, and to subjoin thereto a draft of such questions as they deemed fit to be put to the consulted Judges in pursuance of the judgment of the House

Sept. 23, 1831.

of Lords. Cases were accordingly put in ; and the appellants proposed the following questions: 1. “ Is intimation of an assignation of a personal right, or of a real right not requiring seisin, the regular mode of completing the title of the assignee ? and if so, is the assignation of a lease an exception from the general rule, and on what grounds is it excepted ? 2. If it is not an exception, is intimation to the landlord sufficient, whether the original lessee be in the natural or the civil possession ? 3. When the natural possession is held by a party deriving right, whether as sub-tenant or otherwise, from the original lessee, is intimation to such party as well as to the landlord sufficient to complete the right of the assignee ; and is the consent of such party to the assignation an equipollent to intimation ? 4. If intimation is not sufficient to complete the right of an assignee to a lease, what is necessary to complete it ; and if possession be requisite, what kind or degree of possession is necessary ? 5. More especially, is the granting of a sub-lease, whether to the original lessee or a third party, such an act of possession as will complete the right of an assignee ; and is it necessary to the validity of such sub-lease that a sub-tack duty be specially made payable to the assignee ; or is it sufficient that the sub-tenant be bound to pay the rent, and perform the prestations in favour of the landlord which are stipulated in the principal lease ? 6. If the right of the assignees to the leases was duly completed, did they also acquire right to the machinery and utensils of the bleaching and printing works established on the lands, without a separate delivery of them to the assignees, it being kept in view that the parties in possession of such machinery and utensils at the date of the assignation agreed to hold them by virtue of a sub-lease from the assignees ? ”

The respondent proposed the following questions :—“ 1. Whether, the original tenant continuing in possession, assignation of a lease may be completed by bare intimation to the landlord, without any possession, natural or civil, on the part of the assignee ? On the contrary, whether, in a competition between two assignees, the assignee first obtaining bonâ fide possession, would not be preferred to the assignee who had merely intimated his title to the landlord ? 2. Whether this would not hold a fortiori where the assignation attempted to be completed by

Sept. 23, 1831.

“ intimation merely stood qualified by an understanding between
 “ the parties (the landlord included), that the assignee should not
 “ enter into the possession, but that the possession of the original
 “ tenant should remain undisturbed? 3. Whether the original
 “ tenant, without ceding possession, natural or civil, of the subject,
 “ can, by a mere deed of assignation, erect his lease into a security
 “ for debt in favour of a creditor who does not enter into posses-
 “ sion, nor at all take up the subject in the character of a real and
 “ bonâ fide tenant; and whether, if it be competent thus to assign
 “ the original lease in security to one creditor, there be any prin-
 “ ciple for at all restricting the number of creditors who may hold
 “ such securities over the same lease, if actual and bonâ fide pos-
 “ session be not required as an essential in the constitution and
 “ completion of the assignee’s right; in a word, whether it be
 “ consistent with the nature and purpose of the right of lease, and
 “ with the relations thereby created between landlord and tenant,
 “ that that right may, by several assignations, be conveyed in
 “ security to different creditors of the tenant, not one of these
 “ creditors ever entering into actual possession as assignee to the
 “ right of lease in the only legal and proper sense of the term.
 “ 4. Whether, in the whole circumstances of the present case, the
 “ assignation executed in favour of the Glasgow Bank was a
 “ validly completed assignation of the leases in dispute so as to
 “ transfer the whole right of the tenants, Newbigging and Com-
 “ pany, over to the Bank, qualified merely by their back-bond in
 “ favour of Newbigging and Company? or whether, on the con-
 “ trary, the right of lease did not at the date of the bankruptcy
 “ still stand vested in Newbigging and Company? and whether
 “ it was not preferably carried by force of the sequestration, and of
 “ the right completed by the trustee under the same, followed, as
 “ the trustee’s right was, by the first real possession of the sub-
 “ ject? 5. Whether, supposing the assignation in favour of the
 “ Bank to have been duly completed, so far as regards the leases,
 “ the right to the machinery and utensils was also carried as an
 “ accessory to the leases? or whether, on the contrary, the ma-
 “ chinery and utensils, so far at least as they are to be held
 “ movable property did not remain with the bankrupts, the
 “ assignation in regard to them being of no effect, as being an
 “ assignation of movables retentâ possessione.”

The consulted Judges, having considered the cases, returned

the following opinions:—“ It is a general rule in the law of Scot- Sept. 23, 1831.
“ land that possession, natural or civil, is necessary to complete
“ the transference of a real right. A tack is a real right, by force
“ of the statute 1449, in a question between assignees and ad-
“ judges from the tenant; and to that case, therefore, the general
“ rule applies. This is vouched by the concurrent authority of
“ every institutional writer, and by an uninterrupted series of
“ decisions for more than two centuries. When the transference
“ depends on natural possession, a difficulty can seldom occur;
“ but it is otherwise with regard to civil possession, which is of a
“ less palpable nature, and not so well defined in law. If a prin-
“ cipal tenant, wishing to transfer his lease, should intimate an
“ assignation of it to his landlord and to his sub-tenant, and if the
“ sub-tenant, after this, should pay rent to the assignee, it is clear
“ that the real right in the assignee would be complete. Further,
“ it may be granted, that if, after due intimation in the manner
“ which has been mentioned, the question should arise before
“ a term's rent became payable, the assignee might still be held to
“ have attained civil possession; for, by the intimation itself, he
“ had assumed the control of the sub-tenant's management, put
“ himself in titulo to sequesterate for current rents, and maintain
“ other possessory actions, and, in short, asserted his possession
“ in every way which the nature of the case admitted.

“ But, in the present case, we are of opinion that no possession,
“ natural or civil, followed on the assignation by Newbigging and
“ Company to the Glasgow Bank. The avowed object of the
“ transaction was to interpose the Bank as a principal tenant be-
“ tween the landlord and Newbigging and Company, solely to
“ create a security for an advance of money made by the Bank to
“ Newbigging and Company, who were to continue in the natural
“ possession of the subject. Accordingly, it is admitted that the
“ Bank never attained natural possession. With regard to civil
“ possession, Newbigging and Company never paid rent, nor per-
“ formed any prestation of the tack to the Glasgow Bank; nor
“ did the Glasgow Bank pay any rent, or perform any prestation
“ to the landlord. There was no opportunity of intimating an
“ assignation to a sub-tenant, for there was no sub-tenant distinct
“ from the cedents and the assignees. There was an attempt, in-
“ deed, to constitute the cedents sub-tenants to the assignees; but
“ that attempt proved entirely abortive. The intended missive of

Sept. 23, 1831. “ subtack was informal and null; it was not written on stamped
 “ paper, and it did not specify any rent, which is inter essentialia
 “ of the contract of lease. No possession followed or could follow
 “ upon it different from the possession which Newbigging and
 “ Company had attained, and were holding, by virtue of the
 “ principal tack. Therefore the case plainly resolves into a
 “ collusive device to create a latent security over a real right,
 “ without change of possession, either naturally, civilly, or sym-
 “ bolically; an attempt at variance with the first principles of
 “ the law of Scotland, and which, if it could be accomplished,
 “ would give rise to mischievous consequences.

“ The same reasoning applies to the utensils, holding them
 “ to be heritable, and therefore part of the subject of the lease.
 “ Holding them to be movable, a security over them, retentâ
 “ possessione, is manifestly ineffectual.”

Lord Medwyn.—“ I concur in the above opinion, understand-
 “ ing that it does not import that an assignation by a principal
 “ tenant, where there is a power to assign, must be intimated
 “ both to the landlord and sub-tenant; but that such an as-
 “ signation, if intimated to the sub-tenant alone, and the assignee
 “ levy or attempt to levy the sub-rent, will complete the right of
 “ the assignee.”

Lords Balgray and Gillies.—“ We concur in the result of the
 “ opinion of the majority of the consulted Judges; but we en-
 “ tertain considerable doubts as to some of the general propo-
 “ sitions in law. We consider a lease to be a right of an anomalous
 “ nature. Its creation and its transmission are to be regulated as
 “ if it were, what it truly is, a personal right. We therefore can-
 “ not affirm that it is the law of Scotland that an assignation of
 “ a lease duly intimated is per se an imperfect right, unless fol-
 “ lowed by natural or civil possession. In the opinion, so far as
 “ founded on the special circumstances of the case, we entirely
 “ concur.”

Lord Craigie.—“ It seems to be agreed on all hands that the
 “ contract of location or lease, whether relating to lands or other
 “ subjects, is merely a personal contract. In the case of a lease
 “ of lands, therefore, as soon as the lessor, being at the time pro-
 “ prietor of the lands, has disposed of his property, he has no
 “ power over the lessee, nor over the lands contained in the
 “ lease; and a lessee having power to assign, after having executed

“ and delivered a formal assignment, cannot have a better or Sept. 23, 1891.
“ broader right.

“ To prove this, it only seems necessary to resort to the earliest
“ enactment on the subject, that of 1449, c. 17. It is in these
“ words :—‘ It is ordained, for the safety and favour of the poor
“ people that labours the ground, that they, and all others that
“ has taken or shall take lands in time to come from Lords, and
“ has terms and years thereof, that suppose the Lords sell or
“ annalzie that land or lands, the takers shall remain with their
“ tacks unto the issue of their terms, whose hands that ever the
“ lands come to, for sicklike mail as they took them for.’

“ Thus it appears, 1. That by the common law the landlord or
“ proprietor of lands could not effectually grant a lease to en-
“ dure beyond the period of his right. 2. That the extension of
“ the right of the tenant by positive statute, and in express devia-
“ tion from the common law, is confined to the case of buyers, or
“ singular successors, in the property of the lands.

“ And so in practice the statute has been understood. Where
“ lands fall into the hands of a superior in virtue of any of the
“ feudal casualties, or in the case of a lease granted by a wad-
“ setter when the right of reversion has been exercised, and in
“ every case where the right of the lessor is set aside, the current
“ leases flowing from him are of no effect for ensuring possession
“ to the lessee.

“ It is the more necessary to attend to this, because in many of
“ the books of authority there are expressions from which it has
“ been inferred, that, by the statute, leases had become real rights,
“ and that they could not in any case be effectual to third parties,
“ unless followed with natural and actual possession. The very
“ opposite proposition, as it humbly appears to me, is the true
“ one.

“ Properly speaking, a lessee of lands has no right to the lands.
“ He has a right of possession merely ; and so it must be governed
“ by the properly attested agreements between those who have an
“ interest in it. A lessee may renounce his lease, in whole or in
“ part, to take effect at a certain term not yet come ; or the lessor
“ may give up a part of the rent due to him ; and in both cases
“ the renunciation will be effectual against an after assignee, with-
“ out publication or intimation of any kind ; and why should not
“ an assignation be attended with the same effect, if made bonâ

Sept. 23, 1831. “ fide, and no undue concealment practised? In short, a lease is
“ quodammodo, and, so far as the statute goes, equivalent to a
“ real right, in a question between a lessee in possession and a
“ purchaser of the lands. But here the resemblance ceases,
“ and beyond this it is merely by an unauthorized analogy that
“ the expression has been employed in a more extensive sense.

“ To this general doctrine there is only one exception to be
“ considered in the sequel; namely, where by undue delay in
“ taking possession, according to the nature and purpose of the
“ right on the part of a lessee, or the assignee of a lease, a third
“ party has been induced bonâ fide to make a separate agreement,
“ and has thereafter been introduced into the full and peaceable
“ possession of the lands contained in the lease, before the prior
“ lessee or assignee, and without knowing that such prior right
“ existed. If he is aware of the prior lease or assignation, he is
“ accessory to the wrong of granting double rights, and can take
“ no benefit by it.

“ In the case where a lease is assigned by the original tacksman
“ by virtue of power, either expressly given, or where, from the
“ endurance of the lease, such a power is presumed to have been
“ given, there are three individuals who alone are immediately
“ interested. 1. The cedent, who, after delivery of the assignment
“ has in the ordinary case no right whatever, and ought to have
“ none, whereby he may injure the assignee. 2. The assignee,
“ who, after acceptance, comes under all the obligations prestable
“ by his author to the landlord, and who, therefore, ought to have
“ all the benefits of the right; as to him, the case is the same as
“ if he had obtained a new lease from the owner of the lands; and,
“ 3. The owner of the lands, who, although entitled in every case
“ to object, if an unfit person is made assignee, is in all other
“ respects bound to the assignee as much as the assignee is bound
“ to him.

“ It is no doubt necessary to create a direct obligation upon the
“ landlord, that he should be informed of the assignment; but for
“ this no particular form is necessary. If, de facto, he knows that
“ such a right has been granted, which he may do in many ways
“ as well as by direct communication, the transfer is as effectual,
“ both for and against him, as if it had been intimated to him by
“ a notary, or in the form of an executed summons. This, as it
“ humbly appears to me, is a case quite independent of the late

“ statute 54 Geo. 3. c. 197, s. 13., which relates only to inti- Sept. 29, 1831.
“ mations indispensably necessary in point of form to complete
“ the intimated right. If, after such knowledge, the landlord
“ voluntarily does any thing to injure the right of the assignee,
“ and particularly if he concurs in any act by which the original
“ tenant attempts to prefer a second assignee to a former one,
“ he also must be held accessory to the granting of double rights,
“ as well as the cedent, and the second assignee, if the latter
“ is cognizant of the prior right.

“ Where two assignments of the same lease are given to
“ different persons, without possession following upon either, the
“ prior assignment is preferred to the later one.

“ Such being the state of the parties immediately interested in
“ the transmission of a lease, and in most other rights purely of
“ a personal nature, it would seem to require a positive enact-
“ ment to overturn the whole transaction in favour of an individual
“ who, at the time of the assignment, had no interest in the subject
“ to which the lease relates. In this view, it would seem to be ne-
“ cessary that some publication should be required by the public
“ law, as in the case of real rights; and it has been sometimes pro-
“ posed that there should be such a record as to leases; but the
“ expense which would thus be created, and the trivial nature and
“ value of leases, until a late period, have always been considered
“ to counterbalance any advantage that could thereby be ob-
“ tained; and when it is kept in view how easily any one desirous
“ of acquiring right to a lease may obtain information from the
“ owner or possessor of the lands, it would seem to be very unne-
“ cessary. It must be justly held, therefore, in this as in other
“ cases of personal rights or contracts, that unusquisque debet
“ scire conditionem ejus cum quo contrahit. In such a case as
“ the present the right of the assignee could not in the smallest
“ degree interrupt the facility of transferring the use of the
“ lands, or other real property, to one who had occasion for it;
“ and as to those who looked to the lease merely as a subject of
“ security, they could be at no loss, by proper inquiry, to ascer-
“ tain how the right stood.

“ And holding that no publication in the case of leases is ne-
“ cessary or required by law, it seems rather extraordinary that,
“ upon notions of expediency, some other intimation of a more
“ limited and most imperfect kind should nevertheless be consi-

Sept. 23, 1831. “ dered indispensable. The expedients suggested by those favour-
“ ing the introduction of such a principle prove how ineffectual
“ and unsatisfactory it would be. In the case of Russell against
“ Earl of Breadalbane it was held by some that intimation of
“ such an assignment might be made to the manager of a stone
“ quarry held by joint lessees and partners, although such manager
“ could have no concern in the matter, nor any right, without ex-
“ press authority, to divulge what might pass between his em-
“ ployers in reference to their mutual transactions; and the form
“ of intimation to sub-tenants holding of the original lessor, so
“ far as regards the transfer of the right, appears to be just as
“ little to the purpose, and as little likely to afford the means of
“ knowledge to the public at large. As proving the existence
“ and reality of the transaction between the assignee and cedent,
“ the knowledge of these parties may be of some use; but to
“ prefer information from them to that which every one may
“ obtain from the landlord or his factor or from the possessor at
“ the time, (those individuals having no interest to conceal what
“ they know,) appears to me, with submission, to be not a little
“ unreasonable.

“ It has also been said, that in the case of a sub-lease granted
“ by assignees to the cedents, besides the rent payable to the
“ landlord, some surplus tack-duty should be paid to the as-
“ signees; but if the additional rent were of considerable
“ amount, it would resolve into an usurious transaction; and,
“ at all events, such payment could not be more easily known
“ to third parties than the sub-tack itself. The only appro-
“ priate obligation in such a case is the same as is binding on
“ the original tenant; and one having right to a lease by a total
“ sub-lease or assignment must hold it under the same condi-
“ tions as his author, so that it is quite unnecessary to say any
“ thing concerning it.

“ It will be remembered that even in the case of personal rights
“ to lands, it was long held that the first conveyance completely
“ divested the disponent. This was only departed from in 1737
“ in the noted case of Bell against Gartshore, and chiefly, as it
“ appears, in consequence of the statutes requiring the publication
“ of all land-rights in certain registers established for that pur-
“ pose; which would have been in a great measure ineffectual
“ if, after the granting of a personal right which did not enter

“ those records, no effectual conveyance could be made by the Sept. 23, 1831.
 “ same disponent or by those immediately deriving right from
 “ him. But this reasoning appears to be altogether inapplicable
 “ to leases and other agreements respecting lands, which do not
 “ require or admit of being registered for publication, and
 “ where, in the general case, the obligation arising from agree-
 “ ment is not pleadable against singular successors.

“ It is a mistake to say, generally, that an adjudication of a
 “ lease is preferred to an assignation, unless followed with actual
 “ possession. The decision referred to was rested upon specialties;
 “ the assignation, which had been granted by one brother to an-
 “ other, having remained dormant and latent, and entirely un-
 “ known either to the landlord or sub-tenants, and, as it would
 “ appear, intended merely as an assignment to the rents. There
 “ has also been a mistake in the quotation from Lord Kilkerran
 “ in the same case; the reasoning at the bar, in which a lease is
 “ held out as a real right, having been brought forward instead
 “ of the concluding part of the report, which truly contains the
 “ opinion of the Court, viz. that in such competitions it was
 “ civil possession in opposition to natural or actual possession
 “ which was chiefly regarded; and that the former might be
 “ sufficiently attained, either by payment of the rent to the pro-
 “ prietor, or by enrolment of the assignee as tenant; and in
 “ many other ways the reality and fairness of the transaction,
 “ as between the cedent and assignee, may be established with
 “ equal certainty.

“ There is a case reported by Dirleton which may appear at
 “ first sight to favour the pursuer's argument. It was a question
 “ between a singular successor and the trustee for a wife who had
 “ obtained from her husband a lease, to commence at his death;
 “ the right of the former, which was preferred by the Court,
 “ having been followed with infestment before the husband died.
 “ But even there, as stated by the reporter, the determination was
 “ partly rested upon the circumstance, that the lease had been
 “ granted for a period commencing in futuro. And Lord Stair
 “ (24th February 1676), who reports the case at greater length,
 “ says, ‘ that if the tack had been to the wife, or her trustee to
 “ take present effect, the husband's possession would have vali-
 “ dated the same, and so have enjoyed the benefit of the same
 “ jure mariti.’ In short, although latent, or exclusive, or fraud-

Sept. 23, 1831. “ ulent transactions in the form of a lease, or of an assignation
 “ to a lease, might be disregarded, such agreement has been al-
 “ ways considered as a personal contract, and as such supported,
 “ if followed with that degree and extent of possession of which
 “ the right is susceptible.

“ But, since the date of these cases, the law appears to me to
 “ have been completely fixed by a series of decisions commencing
 “ more than forty years ago, which have been followed in practice
 “ in innumerable instances, and are at present known to affect
 “ property and commerce to a great extent. I refer to the case of
 “ 8th July 1783, not reported, but referred to in the subsequent
 “ case of Hardy, Douglas, and others, 6th June 1794, which was
 “ decided upon the same principle; and it was followed by an
 “ unanimous decision in 1813, in the case of Yeoman v. Elliot
 “ and Foster, the rubric of which is as follows:—‘ A right to a
 “ lease by assignation is completed by entry of the assignee’s
 “ name as tenant in the landlord’s rental-book.’ In this last
 “ case it will be remembered that no rents had been paid by the
 “ assignees nor by the sub-tenants after the date of the assignation,
 “ the first term of payment not having arrived before the cedent’s
 “ public bankruptcy. But that circumstance should have rather
 “ operated against the validity and fairness of the assignation.
 “ In these cases the authorities of Stair and Kilkerran referred
 “ to were stated by the parties objecting to the assignation, but
 “ disregarded, and, as it humbly appears to me, with great
 “ propriety and justice.

“ My opinion therefore is, that there may be an effectual as-
 “ signation of a lease of lands in security of a debt, although it
 “ may not be followed with actual and natural possession, such as
 “ is required by the statute in 1449, in a question with a singular
 “ successor in the lands; and it would be most inexpedient at this
 “ time if a different opinion were to prevail. Indeed, the abstract
 “ point seems now to be hardly disputed. If there had been a
 “ formal sub-lease by the assignees to a third party, or if the as-
 “ signees had been acknowledged by sub-tenants put in by the
 “ original lessee, or if, after assignation, the cedent had ob-
 “ tained a formal sub-lease by which some tack-duty, however
 “ small, had been directly payable to the assignees, it is not
 “ said that the assignment could have been liable to challenge.
 “ The objections now brought forward appear to be, 1. That the

“ sub-lease in this case was not attested according to law ; and, Sept. 23, 1831.

“ 2. That as, notwithstanding the assignation, the cedents retained possession, a presumption arose that the assignation had been collusive and fraudulent. But this reasoning appears to be wholly groundless. When possession has followed upon a written lease, however informal, and still more when a large sum has been paid in consequence of it, it cannot be pretended that there is room for any challenge, either by the creditors of the cedent or of the assignee. Besides, the question here is not as to the formality of the writing or the endurance of the sub-lease, but as to the true and legal state of the possession held by the parties ; and taking in view the acceptance of the assignees by the landlord as tenants, and the payments de facto made by the bankrupts, and which, in a question between them and the assignees, could only be imputable to their obligation as sub-tenants, the result appears to be noways doubtful ; and the presumption arising from retaining possession being only *presumptio hominis*, and chiefly in respect to moveables, cannot apply to a case like this, where there is clear and unexceptionable evidence to the contrary, the assignation, which was most onerous, having been followed by every act of possession of which the right was susceptible. It was intimated to the landlord, so as to be binding on him, and to subject the assignees to the whole obligations of the lease ; it was acknowledged in the books kept by the landlord, or (which is the same thing) in the books kept by his factor, the payments being made distinctly by the cedents as sub-tenants to them ; and as soon as the insolvency of the cedents was known, the landlord took care, in the most decided terms, to assert the claims thus competent to him against the assignees, who without hesitation admitted their liability.

“ The circumstances do not appear to have been attended to with sufficient care. The assignation (dated the 12th of March 1816) was *ex facie* absolute, though qualified by a back bond of the same date. By it the assignees became directly and expressly liable to the landlord for the rent, and all the other prestations of the lease. On the 14th of March the assignation was formally intimated to the landlord, and as formally acknowledged and ratified by him, and the assignees entered in the rental of factory accounts of the same year. On the 15th of March the sub-

Sept. 23, 1831.

“ lease was granted, whereby the cedents became bound to pay the
“ rents, and fulfil the other obligations of the lease. In the sub-
“ lease the rent is left blank, and properly, as the assignees were
“ only interested that it should be regularly paid. It would have
“ been an useless and absurd ceremony for the assignees, at the
“ end of each half year, to demand and receive the rent, for the
“ purpose merely of paying it over to the landlord, and in a
“ bonâ fide transaction, such as here took place, could never be
“ thought of; and the sub-tenants uniformly paid what was due
“ at each term until their bankruptcy in July 1819. The terms
“ of the receipts granted by the landlord or his factor do not
“ appear. But, considering the entries in the landlord’s books,
“ and the communications which took place between him and
“ the assignees immediately after the bankruptcy, there seems
“ no room to doubt that the obligations and rights of the parties
“ in their respective characters and relations as ascertained and
“ explained by their former proceedings were strictly attended to.

“ After this detail it may be thought almost unnecessary to ad-
“ vert at any length to the case where the assignee of a lease has
“ unduly delayed to make any use of his right, and where a second
“ assignee, having been thereby encouraged to acquire a second
“ conveyance, has obtained possession before any overt act of
“ possession on the part of the first assignee.

“ The principle of such decisions as are to be found in the
“ books on this subject is perfectly sound. It is not confined to
“ the assignation of a lease, but applies to every case in which,
“ by the careless and dilatory exercise of a legal right, heavy loss
“ is occasioned to a third party. Before the acts requiring the
“ registration of real rights it was applied to base or subaltern
“ grants of land, though followed with infestment, Ersk. 2, 7, 10;
“ and it is analagous to that which has lately been recognized,
“ although perhaps in some instances carried too far, where
“ the managers of a banking company, having allowed their
“ agent to act in opposition to his duty, without giving due
“ notice to the agent’s cautioners, were held barred, personali
“ exceptione, from having recourse against the cautioners. But
“ in a case like the present, and under all the circumstances
“ which have been stated, the objection appears to be inad-
“ missible ; for,

“ 1. Holding that a lease may be assigned in security of debt,

Sept. 23, 1831.

“ it appears that in this case the assignees did every thing that
“ could be required from them for the completion of their right
“ according to its nature and purpose. If the question, therefore
“ had been between them and a second voluntary assignee, who
“ might upon the slightest inquiry have obtained information in
“ so many different ways as to the existence of such an assignment,
“ the loss, if any, would have been attributable to him, and not
“ to the prior assignees ; but,

“ 2. In the question which here occurs the competition is not
“ between two voluntary assignees, one of whom, though prior in
“ right, has not (as it is contended) entered into possession as he
“ ought to have done ; and where the second assignee can plead
“ prior, actual, and exclusive possession. It is a question between
“ assignees to a lease and a statutory trustee under a sequestra-
“ tion, whose only title to the lease arises from the general
“ adjudication, which is for the benefit of all the creditors of the
“ bankrupt, and comes in the place of those adjudications which
“ would have otherwise followed in virtue of the separate debts
“ and obligations of the bankrupt ; and which separate adjudica-
“ tions, it must be kept in view, have been prevented by the
“ statute.

“ Before the general adjudication the trustee had no right to
“ the lease. The bankrupts had none, except as sub-tenants, until
“ the debt due to the assignee in security had been discharged.
“ But long before this, and while the estate was under the admi-
“ nistration of the statutory factor, the right of the assignees was
“ fully known and recognized, the sequestration having taken
“ place in the month of July 1819, and immediately followed
“ with a communication between the landlord and the assignees
“ and the statutory factor, and the payments made to the land-
“ lord by the factor, as coming in the place of the sub-tenants.

“ Under the sequestration, the state of the parties at the date
“ of the sequestration must be the rule. The possession of the
“ judicial factor or of the trustee must be held as the possession
“ of all and each of the creditors according to their rights at the
“ time ; and the general adjudication which follows can give no
“ right, or even a title of possession, which would alter or dimi-
“ nish the rights of any of the creditors ; and holding, that in this
“ case the assignees were preferable, unless actual or exclusive
“ possession had been obtained by the trustee in favour of the

Sept. 23, 1831. “ general body of creditors, there seems to be no pretext for
“ resorting to the doctrine upon which so much stress has been
“ laid, as to priority of possession.

“ It often happens that a trustee enters into the management
“ of lands covered with heritable securities; but this makes no
“ difference on the preferences or privileges competent to the
“ heritable creditors. In this case it is hardly possible to imagine
“ that the judicial factor paying for the sub-tenants the rents,
“ which by their sub-lease they were bound to pay, and had been
“ in the use of paying, could in the smallest degree affect the
“ interests of the parties.

“ In a late case it was justly decided (and the decision has been
“ affirmed in the House of Lords) that the adjudication in favour
“ of a trustee upon a sequestrated estate gave the same preference
“ to the creditors of the ancestor over those of the heir which
“ would have been competent if each individual creditor had led
“ a separate adjudication, and upon the same principle the case
“ of *Holmes v. Reid* was lately decided.

“ Before leaving this subject it may be proper to advert to the
“ situation of the prior assignees, in reference to the landlord, if
“ the statutory trustee were to be preferred to him. Can it be
“ said that the prior assignees, after being deprived of their secu-
“ rity, are liable for the rents and other prestations of the lease, as
“ they certainly were, after having been accepted by the landlord?
“ Could the sub-tenants admitted to possession by the assignees,
“ supposing them different from the cedent, be removed by the
“ trustee? An authority has been quoted for showing that the
“ creditors of a bankrupt may, under a sequestration, reject a
“ lease, or the assignation of a lease, if they judge it expedient.
“ But are they empowered, at the same time, to oust a prior
“ assignee in security, who must still remain subject to the obli-
“ gations arising from the lease?

“ On these separate grounds, and in the particular circum-
“ stances of this case, I am humbly of opinion that the trustee was
“ not authorized or entitled, by the general adjudication, to ex-
“ clude the assignees in security from the full enjoyment of a prior
“ and bonâ fide right, known to him, as well as to all the parties
“ immediately interested, long before the general adjudication
“ was obtained. In such a case the trustee cannot put the ge-
“ neral body of the creditors in a better situation than the as-

“ signees of the lease. The creditors may claim generally the Sept. 23, 1831.
“ benefit of possession through the trustee *pari passu* with the as-
“ signees, if standing in the same circumstances; but, unless they
“ prove a prior possession, the prior assignee ought to prevail.

“ I have yet some observations to make upon two cases
“ lately decided, where the same question occurred. In the case
“ of *Russell v. the Earl of Breadalbane* I concurred with the
“ other Judges in thinking that, on the specialty more distinctly
“ brought into view in the last stage of the proceedings, the
“ preferable right of the Earl could not be justly disputed. But I
“ also thought he ought to be preferred, 1. Upon the general
“ grounds already stated; 2. Because the action was brought in
“ virtue of a voluntary and general trust-deed, by which the inte-
“ rests of the non-acceding creditors could not be affected; and,
“ 3. Because the Earl's prior assignment was specified in the
“ trust-deed itself; so that the creditors, knowing of it, could
“ not avail themselves of the trust-conveyance, to disappoint a
“ prior right.

“ Again: the other case, that of *Paul v. Inglis*, I had no op-
“ portunity of considering until a majority of the Court had
“ formed and given their opinions. Perhaps it may have been
“ rightly decided upon the footing that the assignees of the lease
“ had been improperly dilatory in communicating their right to
“ the parties interested; but I must say that the circumstances
“ of the case were not ascertained as they ought to have been.
“ On the one side it was stated that *Macfarlane*, to whom in-
“ timation of the assignment had been made, was proprietor
“ of the subjects, and also entitled to a quit-rent payable by
“ the assignee; while, on the other side, it was averred that
“ this person, to whom only before the sequestration, intima-
“ tion had been made, was no proprietor, but had been a
“ prior assignee, and had made a general assignment to the
“ bankrupt. In the one case it humbly appears to me that inti-
“ mation to *Macfarlane* ought to have been held as sufficient,
“ and especially in a question with the statutory trustee; in the
“ other case it could hardly be said that the assignation had been
“ either intimated or followed with possession, as it might have
“ been in justice to third parties.

“ As to the question raised respecting the machinery and
“ utensils found at the date of the sequestration upon the subjects

Sept. 23, 1831. “ under lease, it does not seem to have been in the view of the
“ Judges of the Second Division when the opinions of the Court
“ were required.”

Lord Fullerton.—“ Although a lease of lands be, like any other
“ contract of location, in itself personal, yet it has become, in
“ virtue of the statute 1449, a real right—a character uniformly
“ assigned to it by our institutional writers, and confirmed by
“ a series of decisions which it is impossible now to disturb. As
“ a consequence of this, and upon the same authority, it may
“ be assumed that possession is necessary for the effectual con-
“ stitution and transference of the right. In this respect, there
“ may be some ground for the supposed analogy between pos-
“ session in relation to a lease, and sasine in the case of a right
“ of property. But the analogy is imperfect. In the latter case,
“ the sasine, being attested by a written instrument, is neces-
“ sarily connected with the special grant on which it proceeds.
“ Possession, in the case of a lease, does not admit of any such
“ distinctive connexion with a particular title; and as the title
“ consists of a personal contract, on the terms of which the
“ existence, duration, and value of the right depend, the pos-
“ session may remain ostensibly the same, although the right
“ receive every possible modification. By a transaction with the
“ landlord, a tenant holding a lease highly beneficial both as
“ to rent and endurance, may, without any change or suspen-
“ sion of possession, reduce its value in both particulars to any
“ given extent; and there seems no reason to doubt that, by
“ assigning the lease, intimating the assignation to the landlord,
“ and taking a sub-lease from the assignee, he may descend
“ from the situation of tenant under a beneficial lease to that
“ of a sub-tenant at a rack-rent, without affording, by the dis-
“ continuance of his former possession, any means of detecting
“ the change. Although, therefore, a lease may, in consequence
“ of its character as a real right, require possession to complete
“ its transference, it does not seem that an apparent change of
“ possession is indispensable to effect either its transference,
“ alteration, or extinction. Neither is this attended with any
“ dangerous practical consequences; for, as possession under a
“ lease implies merely a right, of which the value depends on
“ the terms of the personal contract forming the title, it never
“ can raise a credit in behalf of the possessor, while the nature

“ and terms of the title remain uninvestigated ; so that it is a Sept. 23, 1881.
“ case to which the principle ‘ unusquisque debet scire condi-
“ tionem ejus cum quo contrahit,’ seems most clearly to apply.

“ To complete the transference of a lease, then, it appears to
“ me that there must be, in the first place, a conveyance of the
“ title or personal contract, in regard to which, I think intima-
“ tion to the landlord not merely competent, but indispensable,
“ as, by the law of Scotland, intimation is the appropriate and
“ requisite act by which the substitution of the assignee for the
“ cedent in every personal contract is effected ; and, secondly,
“ that there must be such possession as can be legally ascribed to
“ the title so transferred.

“ The measures necessary to effect these objects may vary ac-
“ cording to the circumstances of each particular case. When
“ the principal tenant assigns, and places the assignee in posses-
“ sion, the transference is perhaps complete without a formal in-
“ timation to the landlord, because intimation admits of equipol-
“ lents, and the public assumption of possession by the assignee
“ may be viewed in that light. If the cedent has already granted
“ a sub-tack in addition to intimation to the landlord, intimation
“ or some equivalent to intimation to the sub-tenant may be re-
“ quired ; because actual possession being unattainable by the
“ assignee, that measure, or some equivalent having the effect of
“ completing the substitution of the assignee for the cedent in the
“ contract with the sub-tenant, may be requisite to render the
“ possession of the sub-tenant constructively the possession of the
“ assignee ; and, in this view, actual payment of rent by the
“ sub-tenant to the assignee does not seem to be indispensable,
“ although it may supply the absence of a formal intimation to the
“ sub-tenant. In the case of a sub-lease previously granted by the
“ cedent, I consider the true test of the transference of possession
“ to be the existence of some act by which the possession of the
“ sub-tenant becomes referable to the right of the assignee to the
“ principal lease. In a third supposable case, where the assignee
“ grants a sub-tack to the cedent, the original tenant, the trans-
“ ference may become effectual without any ostensible change of
“ possession. But there ought to be, in that case, some separate
“ intimation to the landlord, because there is no public change of
“ possession which admits of being construed as an intimation to
“ the landlord of the assignation by the original tenant.

Sept. 23, 1831.

“ These views seem to be supported by the two decisions chiefly
“ founded on by the parties, and indeed seem to afford the only
“ means of reconciling them.

“ In the first case, that of Wallace against Campbell, the
“ tenant assigned a lease from the Duke of Argyll in security of
“ a debt, and took a sub-tack from the assignee. A competition
“ arose between the assignee and an adjudger, which was deter-
“ mined in favour of the latter. But it does not appear from the
“ reports of that case, that the circumstance of there being no
“ ostensible change of possession was held to be conclusive; for
“ the Court remitted to the Lord Ordinary to inquire, *inter alia*,
“ ‘ what evidence Inverasragan (the assignee) could give, that any
“ part of the yearly rent payable to the Duke of Argyll had
“ been paid on his account as assignee to the tack, or that he
“ was enrolled as tacksman in the Duke’s rental;’ and Lord Kil-
“ kerran, in remarking upon the decision, and obviating the
“ assignee’s plea, that the case did not admit of or require any
“ further intimation, observes, ‘ for still, as has been said, the
“ civil possession was what completed the right; for, as the remit
“ to the Lord Ordinary supposes payment might have been
“ made of the Duke’s rent by the disponent, or he might have
“ been enrolled as tenant, which ought to have served for inti-
“ mation.’ I rather consider the fair inference from that deci-
“ sion to be, that if there had been an intimation, or any thing
“ equivalent to an intimation to the landlord, the assignation
“ would have been supported.

“ And this inference seems to be warranted by the later deci-
“ sion in the case of Yeoman v. Elliot and Foster, 2d February
“ 1813. There the tenants had assigned certain leases from the
“ Duke of Buccleuch in security of advances to the extent of
“ 1,000*l.*, and received sub-tacks from the assignee. But, in addi-
“ tion to these circumstances, the assignee had enrolled his name
“ in the Duke of Buccleuch’s rental books—a step which was
“ equivalent to intimation. In that case the assignations were
“ sustained, though unquestionably they were granted merely in
“ security, and although no rent was paid, or indeed could have
“ been paid, either by the assignee to the landlord, or by the
“ cedent or sub-tacksman to the assignee, as the competition arose
“ before the first term of payment had arrived. I must confess
“ my inability to discover how this decision could have been pro-

“ nounced, unless on the principle already referred to, that the Sept. 29, 1891.
“ title or personal contract being effectually transferred by as-
“ signation and intimation to the landlord, the sub-tack had the
“ necessary effect of rendering the subsequent possession by the
“ cedent and sub-tacksman constructively the possession of the
“ assignee.

“ On applying these principles to the decision of the present
“ question, I am of opinion that the assignation in favour of
“ Messrs. Cabell and Brown is effectual. There can be no doubt
“ that the title was effectually transferred. There was an assign-
“ nation to the lease ex facie absolute, and that assignation was
“ formally intimated to the landlord. There was, in addition, a
“ missive of sub-tack granted by the assignees to Archibald New-
“ bigging and Co., and an acceptance by Archibald Newbigging
“ and Co. written, and, as I presume, signed by Archibald New-
“ bigging, in whose name I understand the original lease stood in
“ trust, as it is said, for the company. Now, although these last-
“ mentioned documents are in many particulars informal, I am
“ inclined to think that they are sufficient to constitute an exer-
“ cise of the assignees' right, to which the subsequent possession
“ of Newbigging and Co. may and must be legally ascribed. In a
“ question between the assignees and Archibald Newbigging and
“ Co., it appears to me that these missives would have been suffi-
“ cient to support the possession of the latter from year to year, on
“ payment of the ' whole rent exigible by the landlord,' with all
“ ' taxes, burdens, and duties affecting the property and posses-
“ sion,' being the terms specified in the missive. As Newbig-
“ ging and Co. had been divested of the original title, the principal
“ lease, by the assignation and intimation to the landlord, and as
“ the missives of sub-tack, though informal, were capable of form-
“ ing a title of possession, I think the subsequent possession of
“ Newbigging and Co. may be legitimately ascribed to these
“ missives of sub-tack, and consequently must be held as the
“ constructive possession of the assignees.

“ In arriving at this conclusion, it is hardly necessary to men-
“ tion that I have thrown out of view entirely the charges of col-
“ lusion and undue concealment made against the assignees. I
“ see no ground for any such charges; and in regard to the sup-
“ posed danger of giving effect to a security over a lease, without
“ any public change of possession, I think, in the first place, that

Sept. 23, 1891. “ the danger, if it existed at all, is inseparable from the very nature
 “ of a lease ; and, secondly, that it is entirely imaginary, in as
 “ much as a lease, considered as a subject capable of raising credit,
 “ never can be relied on, and has no value independent of the
 “ terms of the title of possession, into which terms the party
 “ giving the credit must be presumed to inquire.

“ Upon the other point, the machinery and utensils, I hardly
 “ think that the information afforded by these papers is satisfac-
 “ tory or conclusive. It appears to me at present that, in so far
 “ as concerns the utensils, the claim of the assignees is ill founded.
 “ The assignation, no doubt, conveys the utensils ; but no posses-
 “ sion seems to have been taken of them by the assignee ; and it
 “ is quite impossible, even in the most favourable point of view
 “ for these assignees, to hold the subsequent possession of Archi-
 “ bald Newbigging and Co. as their possession, as the missives
 “ of sub-tack do not mention the utensils.

“ The circumstances regarding the machinery are somewhat
 “ different. The machinery is expressly mentioned in the missive
 “ of sub-tack ; and I am rather inclined to think, that if it truly
 “ consists of articles which, according to the usage of the manu-
 “ facture, are held to be accessory to, and generally go along
 “ with the buildings, the proper subject of a lease, the assignation
 “ and disposition, followed by the missive of sub-tack, might be
 “ sufficient to support the claim of the assignees.”

The cause was now put out for advising by the Second Division.

Lord Justice-Clerk.—“ I have read the cases with every atten-
 “ tion in my power ; but I remain of the opinion which I de-
 “ livered when the cause was formerly before us, that the assig-
 “ nation is not effectual against the creditors.”

Lord Glenlee.—“ I am also of the same mind.”

Lord Pitmilly.—“ I likewise think the former interlocutor
 “ well founded, and entirely concur in the opinion of the Lords
 “ President, &c. I have always thought assignation of a lease
 “ without possession ineffectual ; and but for the specialty in the
 “ case of Russell, on which the decision actually proceeded, I
 “ would have been for adhering to my original interlocutor.”

Lord Cringletie.—“ I have not altered my opinion.”

Thereafter (5th March 1830), “ the Lords, having resumed

“consideration of the cause, with the opinions of the consulted Sept. 23, 1891.
 “Judges, adhered to the interlocutor of this Court, prior to
 “the appeal therefrom to the House of Lords,—but in re-
 “spect that the present judgment proceeds under a remit from
 “the House of Lords, finds, that nothing should now be pro-
 “nounced as to additional expenses, since the date of the in-
 “terlocutors appealed from.” *

Cabbell appealed.

Appellant. — 1. A lease is a mere personal right. The only real rights known in the common law of Scotland are property, servitude, pledge, and perhaps exclusive privilege; but a lease does not belong to any of these classes. It is a personal contract, effectual against the parties contracting and their heirs, but not *ex sua natura* effectual against third parties. Hence it followed, that if the landlord sold the property, or if it was adjudged by his creditors, the purchasers or adjudgers were not affected by the leases which he had granted, but could remove the tenants at pleasure; and the latter had no redress, except a claim for damages against the granter of the lease. This was felt to be a great grievance; and attempts were sometimes made to convert the personal into a real right, by granting seisin of the land to the tenant. But the form of a seisin was unavailing; for the right being radically personal, mere seisin or delivery did not change its nature, and the tenants were still removable at the will of the landlord's singular successors. As, therefore, the common law furnished no remedy, the legislature found it necessary to interpose; and accordingly, by the act 1449, chap. 17, leases were made effectual against purchasers. The only alteration of the common law by the statute was to secure tenants from removal by the landlord's singular successors; but in all other respects, the legislature left the lease still a personal right. The protection afforded by the statute was of the nature of a personal privilege bestowed on “the poor people that labour the ground;” but it left their title unchanged in its nature and character. In order, however, to entitle them to this privilege, it was necessary that they should

* 8 Shaw and Dunlop, p. 647.

Sept. 23, 1891.

be in possession at the time of the alienation by the landlord; and, indeed, this was indispensably requisite for the security of purchasers, because if a latent lease, known to no other persons than the landlord and tenant, and the existence of which is not indicated by any intimation or publication, were to be effectual against singular successors, a door would be opened to innumerable frauds. The appellant, therefore, denies the soundness of the opinion expressed by several of the Judges in the Court below, that a tack is a real "right by force of the statute 1449, "in a question between assignees and adjudgers from the tenant, "and to that case, therefore, the general rule applies." Other of the Judges express an opinion much more correct, when they say of a lease, that its "creation and its transmission are to be "regulated, as if it were, what it truly is, a personal right."

2. Personal rights are transferable by assignation, and the right of the assignee is completed, either by intimation, or by some act which in law is held to be equivalent to intimation. But assignation alone is not sufficient to complete the title of the assignee to the right or subject-matter of the assignation, and the mode of completion depends on the nature of the right or thing assigned. When moveables are the subject of the assignation, there is no party but the cedent and the assignee, and therefore the right must be perfected by possession or delivery. But, if a right or obligation constituted by a third party in favour of the cedent is assigned, the proper mode of completing the assignation is by intimation to such third party. But, though intimation is the most unexceptionable mode of completing an assignation, yet equipollents are admitted to supply its place. Of these, natural possession is one. But if the natural possession by an assignee completes his right as an equipollent of intimation, it follows, that the assignation of a lease is perfected, without the necessity of intimation, as soon as such possession is attained by the assignee. Other equipollents to intimation are admitted. Thus an enrolment of the assignee in the landlord's rental will supply the place of intimation. Without intimation, therefore, or some one of its equipollents, such as the natural possession or enrolment, an assignation of a lease is ineffectual; while, on the other hand, such intimation, or possession, or enrolment in the landlord's rental, completely vests the assignee in the right, and of course divests the cedent, so that no right

remains in him to be either voluntarily conveyed or attached by Sept. 23, 1831. the diligence of his creditors.

3. Even if intimation to the landlord were not sufficient per se to complete the security, still if a tenant, who has sub-set or given the natural possession to another, grant a security by assignation, the right of the assignee will be completed by intimation, both to the landlord and to the sub-tenant, or other person holding possession under the principal tenant; and there was such a sub-set and intimation in the present case.

4. The granting of a sub-lease by the appellants to Archibald Newbigging and Company, was an act of civil possession, which, according to the view of the Court below, was sufficient to perfect the assignment, even though there had been no intimation.

5. The right of the appellants to the machinery and utensils is not distinguishable from their right to the leases.

Respondent.—1. The assignation to the tacks, never having been clothed with possession in the appellants' persons, is a merely personal right, and so affords but an imperfect and uncompleted title, which cannot stand against the real right vested in the respondent. But an assignation of a tack, without possession of any kind, is altogether insufficient in competition with a singular successor, whose right has been duly clothed and completed by possession, to operate any effectual transfer of the real right under the lease. Possession is just as necessary to establish a real right of tack, whether in the original constitution of it, or in any transfer by assignment, as seisin is in the case of a feudal subject. The appellants' pleas rest entirely on the assumption that a lease is merely a personal right, overlooking altogether the important distinction, founded on the statute 1449, c. 18, between the lease before it is perfected by possession, in which case it is a mere personal and uncompleted right, and the lease after it is so perfected, in which case it becomes what the law recognizes as a real right. It is now indisputable, that in the case of competing leases, the lease first clad with possession is the only effectual one; and that, in the same way, in competitions between assignations to leases, or between sub-tacks, or between an assignation and a sub-tack, that right upon which possession has first taken place, to all intents and purposes, cuts out the rest; or, to put the matter in a general shape, the

Sept. 23, 1831.

respondent maintains, that wherever a real right of lease comes in competition with a personal one, the former must of necessity be allowed the preference. Nor is there any equivalent which can be substituted in the place of possession, so as to have the same effect of thus perfecting a lease into a real right. Possession is essential as a solemnity. It is just as indispensable to the completing of the real right of lease, as the taking of sasine is to complete a feudal right; and since, where any proper solemnity is established for perfecting a right, equipollents are not to be admitted, as in the case of feudal rights, in which no equivalent can supply the want of a sasine, possession is no less essential, and no less incapable of being supplied by equivalents in perfecting a right of lease. It is by the authority of statute alone that leases were raised into the class of real rights. But the same statute which produced this change has ever been held to declare, that possession is an indispensable requisite.

2. The intimation of their assignation to the landlord will not avail the appellants; for though intimation may be all very good when there is something belonging to the cedent in the hands of the person to whom intimation is made, and the right to which something is meant to be transferred over to the assignee, as the party who thereafter shall be entitled to demand it, it is obvious that where the subject assigned is matter not of personal claim but of real right, and in itself directly capable of delivery from the cedent to the assignee, intimation is altogether out of the question. Indeed it is laid down by every authority that the legal transmission of a lease, as a real right, is by possession, and not by intimation.

The respondent denies that there is either authority or principle for the appellants' doctrine, that bare intimation to the landlord, unaccompanied by any possession, natural or civil, on the part of the assignee, and unsupported by any sub-tack or other change of title, so as to fix on the tenant's possession the restricted character of a possession as sub-tenant to the assignee, is sufficient, in any legal sense, to complete the assignee's real right, or to vest him in the full right of the lease.

But in addition to the argument founded on intimation, the defenders affect to lay great weight on the circumstance of their assignation being noticed in what they are pleased to term the landlord's rental book.

Sept. 23, 1851.

But this circumstance, even had it occurred in the most regular and unimpeachable shape, cannot possibly be regarded.

3. The alleged sub-tack cannot avail the appellants. It is informal and improbativè, but even had it been liable to no such objections, *ex facie*, it could not, from the latency and collusion of the whole transaction, avail the appellants in the least. There was never any real or *bonâ fide* purpose, on either side, that the subjects should be sub-set; and accordingly, neither did the appellants in any one particular act as tenants in chief, nor did any change of possession ever take place, to fix on the bankrupts the character of sub-tenants.

4. The assignation in the defenders favour was altogether a collusive transaction, having a totally different object from what it bore on the face of it, and being in truth a mere cover for an arrangement, which, if openly entered into, the parties were aware the law would not have recognised.

5. The conveyance to the appellants of the machinery and utensils, as considered apart from the real subject, is unavailing, as being a conveyance of moveables, *retentâ possessione*.

Lord Chancellor.—My Lords, this is a case which involves matters of considerable importance to the law of Scotland, and upon which there has been a difference of opinion among the learned Judges in the Court below. It is strange that there should be any doubt whether or not there has been a decision upon a transaction similar to the one in question, of the assignment of a lease, which occurs of leasehold premises in towns as well as of farming lands in the country almost daily in England, and which must have occurred very often in Scotland. One cannot help being surprised at not finding a decision distinctly referred to, disposing of the question, an intimation of an assignment, and actual possession also, or something equivalent to actual possession, is necessary to constitute a valid transfer? The learned Judges, a very considerable number on both sides, appear to have considered the question, and to have taken different views of it. The opinion of Lord Balgray and Lord Gillies is given very shortly, and very generally; but they so far plainly differ from their learned brothers, that they do not seem to hold possession so necessary as the others do to the transfer of a lease, at the same time that they entirely express their concurrence in the opinion of the Court; but this I can only treat as an indication that they consider the assignment not to have been a real but a collusive and colourable transaction, as the party assuming

Sept. 23, 1891. to assign continued in possession, to all outward appearance, as before. It appears he accounted for the rent to the landlord, and there is no evidence of the other party to whom the assignment is made having done so. It seems like raising up a man of straw between the party assigning and the party entitled to claim. This difference of opinion among the learned Judges below makes me wish to look more particularly into this case. I shall therefore very reluctantly propose to your Lordships to postpone for a short time stating what occurs to me upon the subject.

On a future day.

Lord Chancellor.—My Lords, this case is one not unattended with difficulty. When it was formerly before you, your Lordships were pleased to remit it to the Court below, for the learned Judges of the First Division to consult with the learned Judges of the Second Division; and we have now the benefit of the judgment of the Court below upon that consultation. They adhere to the original view of the question; but we have light let in upon the case by the expressed opinions of all the consulted Judges, who it seems differed as to the grounds, and some of them also as to the result of the decision.

Your Lordships recollect that it appeared to be a case of some importance, though it can be stated in a very few words. There was a lease for the term of one hundred years of premises employed as a valuable bleach-field, held by Hopkirk and Company, which was assigned by them to Archibald Newbigging; and the Company of which Newbigging was a partner having borrowed 7,000*l.* from the Glasgow Bank, and being to receive 5,000*l.* more if wanted, they assigned, when in manifest difficulties, this lease to the Bank. An intimation of the assignment to the lessor followed; but there was no possession taken by the Bank in any way. The Bank then granted a sub-tack to Newbigging and Company, and under this sub-tack it is said, that they, the original lessors and assignors, held under the Bank, their assignees. The Bank also granted a back-bond, setting forth what had taken place, and clearly showing that the assignment to them, the Bank, had only been in security. Now, to say nothing more about the informality of this sub-tack, it is enough for me to observe, that the most important part of the whole, the rent—the render—is blank in the instrument. Newbigging and Company became bankrupt, and the question arises as between the Bank, the assignees of the lease, and the trustee of the sequestrated estate of the assignors of the lease, which shall have the term in question; it being, on the one hand, contended for the Bank, that they have a valid assignment; and it being, on the

Sept. 23, 1831.

other hand, contended that there was no valid assignment, nor any instrument that could pass an interest. In support of the argument for the validity of the assignment, it was mainly urged that the requisite intimation had been made to the landlord. On the other hand, it was contended against the validity of the assignment, that intimation was not sufficient, until the right was clothed with possession in the assignee. In order to supply that defect, admitting for argument's sake that intimation without possession is not sufficient, the Bank contend that they had possession, that Newbigging and Company having assigned, they took the subjects back again as sub-tenants, and that their possession was no longer to be ascribed to their own original assignation as principal lessees, but to the sub-tack as derivative lessees, that their possession was the Bank's possession, and that there was not therefore only intimation but possession also to clothe the assignment. These are shortly the facts, and the bulk of the arguments on each side of the case, with which the Court below has dealt; and the conclusion which I have drawn coincides with that of the Lords President, Meadowbank, Mackenzie, Corehouse, Newton, and Moncreiff, who thus express themselves: "Therefore
" the case plainly resolves itself into a collusive device to create
" a latent security over a real right, without change of possession,
" either naturally, civilly, or symbolically; an attempt at variance
" with the first principles of the law of Scotland, and which, if it
" could be accomplished, would give rise to mischievous consequences." Lords Balgray and Gillies do not go the full length of the earlier part of this opinion, which I have not troubled your Lordships with, namely, that a tack in Scotland, which is a real right by force of the statute of 1449, can only be validly carried to an assignee, if there is, beside intimation, possession by the assignee: which point was the principal ground of the remit to the Court of Session; when it seemed an extraordinary thing, as it occurred to me, that such a matter never had been settled before. Their Lordships state, " We therefore cannot affirm that it is the law of Scotland,
" that an assignation of a lease duly intimated is per se an imperfect right, unless followed by natural or civil possession." That is the opinion of those learned Judges; they do not go so far as their learned brethren in saying that intimation is not sufficient without possession; but in the opinion of those other Judges, so far as it is founded on the special circumstances of the case, they entirely concur. Now, my Lords, I take the same view with those learned Judges (without deciding a question which it does not appear to me necessary for the Court below, in the circumstances of the case, to have decided, and which I do not think it is necessary for your Lordships to deal with)—that there is nothing here, which, by

Sept. 23, 1831. the law of Scotland, can be said to vest a bonâ fide right in the assignee of the Bank, to the exclusion of the rights of the creditors, as represented by the trustee on the sequestrated estate; that it was the setting up of a fictitious person between the one party and the other, by a collusive transaction, and by means of such latent right as is always reprobated in the Scotch law of real property; that the right was not validly passed in such way as to exclude the trustee from entering into competition for it; that there was no parting with the possession, though the transaction purported to part with it; and as to the sub-tack, it appears to me, instead of mending the case on the part of the Bank, greatly to impair it; for I cannot conceive any more flimsy expedient as a right of possession, than to make the possession become, by virtue of a sub-tack, no longer the possession, such as Newbigging had before under his landlord at first, as main lessee, but a possession under his own assignee of the term, taking back from the Bank a sub-lease collusively and latently, to defeat the proper right of the parties. Upon these grounds, and in the circumstances of this case, and without advising your Lordships to decide the general question with respect to the sufficiency of intimation, without possession, I am of opinion your Lordships ought to affirm the judgment now complained of.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

MURDO MACKENZIE, Appellant. — *Mr. John Campbell — Dr. Lushington.*

No. 40. ALEXANDER MACARTNEY, for the Commercial Bank of Scotland, Respondent. — *Mr. Murray — Mr. Miller.*

Cautioner.—A principal debtor in a bond for a cash account with a bank failed, and executed a trust the deed of accession to which allowed a supersedere of diligence for three years; the bank lodged a claim and affidavit, without signing the deed of accession, and a delay of seven years took place: Held (reversing the judgment of the Court of Session), that the cautioner was liberated.

Sept. 23, 1831. In 1811 Mackenzie, along with Ross and Geddes, became bound to the Commercial Banking Company in a bond for a cash credit

2D DIVISION.
Ld. Cringletie.

Sept. 23, 1831

to the extent of 500*l.*, to be kept in the name of Geddes. This bond contained, *inter alia*, the following clause:—"And it is hereby declared, that there is nothing hereby meant to supersede or vacate the security which the said company already hold or may hold over the shares which we, or either of us, hold or may hold of the stock and profits of the said company, for any advances under the bond, or otherwise." It was provided also, "that each member hereby assigns to the committee of management for the time his own shares and profits of the concern, in security of the debts and engagements of the company, and in security of any debts and prestations that may become owing or prestable by him to the company, and for enabling the committee of management, if and when necessary, to sell and dispose of his shares and interests in the company, in terms of the provisions above written, and in general, in security of the performance and observance of his part of the premises." At this time Geddes held four shares, on each of which 100*l.* had been paid up, and which might be worth 125*l.* each. By the contract of the bank, shares are liable for any advances that may be made to the holders, who, on the other hand, are entitled, without finding further security, to operate upon them to the extent of three fourths of the input stock effecting thereto. The bank are further entitled to the refusal of all shares proposed to be sold; and the holders can only sell at the price at which they were offered to the bank and refused. Geddes subsequently acquired six other shares.

Geddes continued to operate upon this cash account for several years. In 1816 his affairs became embarrassed, and considerable correspondence passed between him and William Murray and Son, agents for the bank at Tain, where the cash account had been opened, as well as between these agents and the secretary of the bank at Edinburgh, relative to the disposal of Geddes's bank shares. In October 1816, Geddes wrote Murray: "Owing to the present pressure of the times, I find it necessary to dispose of the ten shares which I hold of the Commercial Bank stock, and I hereby offer them to the bank at 130*l.* per share. You will please forward this letter to the manager, and advise me, when convenient, if my offer is accepted." This letter, Mackenzie alleged, was forwarded to

Sept. 23, 1831. Edinburgh by Murray, on the 26th of that month, but Macartney the Edinburgh secretary denied its having been received there. In December thereafter, Macartney for the Bank, wrote Messrs. Murray: "Mr. John Geddes, Ardmore, writes us, that " he had desired you to make offer to us of the ten shares, at " 130*l.* per share. Such an offer, however, never has been made. " In the above letter he offers them at 125*l.* per share, and " requests, in the event of a refusal, that they may be trans- " ferred to your Mr. William Murray, at that price. The " directors have allowed Mr. Murray to get these shares." On 6th March, he again wrote Messrs. Murray:—" You have not " yet returned the transfer by Mr. John Geddes, in favour of " your Mr. William Murray, of ten shares, which you will please " observe must be done before the transaction can be com- " pleted."

The transfer was completed on 20th March 1817. Prior to that period, however, the cautioner Ross had become bankrupt. On the 12th Mackenzie wrote Geddes, that he was resolved to withdraw his name from the cash credit, and on the 22d, he wrote Messrs. Murray:—" As my name is affixed to a bond of " caution, as surety for Mr. John Geddes of Ardmore, in his " cash account with the Commercial Banking Company of Scot- " land for 500*l.*, in conjunction with Mr. John Ross of Balblair, " I beg of you to inform the Bank, that I now withdraw my " name as cautioner for Mr. Geddes, and that they 'are not " to look to me, as such, in any transactions with him, in " consequence of said bond, from this date; and I trust the " Bank will accordingly be pleased to give directions to get " the said account immediately settled, and the bond annulled, " to save expence or loss to either party." After the receipt of this letter, no further advances were made to Geddes. Shortly thereafter, he called a meeting of his creditors, and on the 2d of April 1817 he executed a trust deed in their favour. At the meeting Mackenzie attended, and was entered in the sederunt as appearing in room of the manager of the Commercial Bank. Murray also attended; but it was alleged he did so on account of other debts than that in question. The trust deed was drawn up by him, and marked as examined and revised by Mackenzie. In that deed the bank is stated as a creditor to the extent of 500*l.* the amount of the cash account, forming

Sept. 23, 1831.

the only debt due by Geddes to the bank. Murray was named one of the trustees, but Macartney maintained that to this trust the bank had never acceded. The deed of accession contained a supersedere of diligence for three years. On the day on which the trust was executed, the secretary wrote Murray:—

“ Mr. Mackenzie’s letter to you, wishing to withdraw his security from the bond for Mr. John Geddes’s cash account, has our attention.” “ From the circumstance of one of the co-obligants for the above cash account having become bankrupt, and the other wishing to withdraw his name, the directors, having no alternative, have ordered the account to be called up, which you will please immediately intimate to Mr. Geddes accordingly.”

On 23d June 1817, Messrs. Murray wrote the secretary:—“ We have reason to hope, if prices of farm produce continue to improve, every person will be paid, with a considerable reversion to his (Geddes’s) family; and we would therefore, on that account, recommend to the Directors not to press his sureties for payment of the cash credit, until we see what way sales will turn out. All the business connected with his farms will continue to be conducted at this office.”

The secretary, on 3d July 1817, wrote Messrs. Murray:—“ The directors will not agree to any delay in payment of the balance, unless a bill at three months’ date is granted by all the obligants in the bond. Indeed, they do not consider themselves at liberty to give delay, after the letter from Mr. Mackenzie, which you sent us in March last, and Mr. Ross having become bankrupt. I am directed to add, that you should have reported the state of this account, and of the security, at the time Mr. Geddes sold his shares, that the directors might have judged of the propriety of stopping the transfer.”

At this period the bank seem to have entertained no doubt of Geddes’s solvency. Bills to the amount of several thousand pounds were then current in the bank, and 200*l.* yearly was allowed to Geddes under the trust. The bank lodged a claim and affidavit. The trustees continued to manage the trust estate, and paid off several of the debts. The bank repeatedly urged the Messrs. Murray to get their claim settled; and on 14th April 1824 the secretary wrote those gentlemen:—“ Have there been any operations on John Geddes’s account, or should we now call it up?”

Matters remained in

Sept. 23, 1831. this state until the 24th of that month, when the secretary intimated to Mackenzie, for the first time, that he must pay up the balance due on the cash credit. Mackenzie denied his liability. A charge was thereafter given him on the bond, which he suspended, and thereafter action was raised. The Lord Ordinary (24th June 1829) having very fully explained his opinion, by a note for the reasons therein expressed, repelled the defences, decerned against the defender in terms of the libel, and found him liable for expences, &c.

The Court (4th June 1830) adhered.*

Mackenzie appealed.

Appellant.—Effect ought to have been given to the plea of the appellant, that he was liberated from all liability, under the cautionary obligation undertaken to the bank, by the conduct of the bank in departing, without his consent, from a collateral security held for the debt; in altering, most materially, without intimation made to him, the nature and extent of his risk; in granting the principal debtor time, delay, and a surcease of diligence, notwithstanding a call on them to urge him to an immediate settlement; in delaying, for seven years, to make any call on the appellant, whilst, in the meantime, they entered into a separate transaction with the principal debtor, got his estate under their control, and, without the cautioner's knowledge, neglected and mal-administered it, so as to destroy his means of relief; and, generally, in failing to observe that due regard to the interests and security of the appellant which is incumbent on a creditor towards a cautioner, under the penalty of liberating him from his obligation of suretyship.

Respondent. — The appellant undertook the obligation to the Commercial Bank of Scotland, of which he now seeks to be relieved, and, on the faith of that obligation so undertaken by him, along with Geddes and Ross, the bank advanced to Geddes the money of which the appellant now refuses to make repayment. The bank did not give time to Geddes, or to any other party, in regard to the repayment of the money due to them;

* 8 Shaw and Dunlop, p. 862.

that is, the bank never prorogated or prolonged the time at which they could have demanded payment from any of the parties concerned of the money in question ; but, unfortunately, in spite of all their exertions to recover this money, these parties, including the appellant himself, delayed to make payment, and this is what he now calls giving time, whereby his own delay in making payment is gravely pleaded as a sufficient ground why he should now be relieved from making payment at all. In point of law, and in so far as regards the bank, the appellant cannot be viewed as a cautioner or surety, but must be held to be a principal debtor, as he appears to be on the face of the bond in question. The respondent has no means of knowing the private arrangements or understanding which subsisted between Geddes, Ross, and the appellant ; and, though it may be true that, in relation to Geddes or Ross, the appellant was a mere surety, the bank neither had, nor have, any means of ascertaining how the fact stands. The bank were not barred by the bond in question, either from advancing money to Geddes on the shares of stock he held in the bank, or from allowing Geddes to dispose of these shares of stock as he thought proper. The bank did not concur in the trust granted by Geddes, or in the system of management under which his affairs were placed by his trustees. The appellant himself concurred in this arrangement, and he had no interest in doing so, except as being the debtor of the bank for the sum drawn out by Geddes, under the bank credit in question. There is no evidence, and no relevant averment that the bank had any transactions with the alleged principal debtor, or can be chargeable with any negligence or delay in attempting to recover payment of the balance in question.

Sept. 23, 1831.

Lord Chancellor.—My Lords, I shall certainly, on the present occasion, recommend to your Lordships to take some little time to look into the matter, respecting the construction of this bond—not that I entertain any doubt that it is in its nature a cautionary bond ; for although it puts the party contracting in the same condition, in some respects, with the principal debtor, nevertheless, the manner in which it states the consideration for which it was granted shows, upon the face of it, that the bond is cautionary—that the debt is from one of the obligors to the obligee, and that the other binds himself with that one for the payment of that one's debt ; yet, as I am

Sept. 23, 1831. pressed with the opinion of Scotch lawyers, and with the opinion of the Court of Session who are conceived to have decided otherwise, (of which however I do not see any clear evidence, for they might have decided entirely on the other ground) and as it is stated that these obligations are exceedingly common, and that this is the ordinary form of security in such transactions, I think it my duty to look into the matter further, with a view to seeing whether a certain form of words must be used—whether the word “for” for instance, which appears to have been thought necessary in a case, the report of which, however, is one of very little distinctness, must be inserted, or some equivalent term. We are told by authority in Scotch cases, that even the word “for” is not always enough; and that, to make it a bond of express cautionary obligation, there should be the word cautioner or surety, or something of that kind introduced. But though I cannot conceive how technical words should be required to constitute suretyship or caution, yet I think it will be our duty to consider it fully before it is determined. If this should be found to be strictly, as I conceive it is substantially, a cautionary bond, the question will then be, whether, by allowing of the sale of shares, or by giving time, or by other measures, the Commercial Bank have released their claim on Mackenzie as a surety. With respect to this point, I have, during most of the argument, struggled with what appears to me to have great weight, that this case ought to have been sent to be tried as an issue in the Jury Court. I wish that had been the course adopted in the beginning; it would have saved a great deal of trouble—a great deal of discussion in the Court below—a great deal of expence,—and also, in all probability, would have saved the present appeal. Nevertheless, as the question has been brought here, it will be with the greatest possible reluctance that I shall advise your Lordships to occasion any further delay in the final decision of the case; and I consider that the acting under the bond to which my attention has been in the last stage drawn, and which I certainly was not aware of till a very late period of the argument, does throw very considerable doubt on what might appear to be otherwise free from doubt. Perhaps I ought—as that was not originally presented in the argument—to have called upon the learned Counsel on the other side, or, at all events, to have given him the liberty to address a few observations, of course not exceeding the bounds of a very moderate rejoinder, upon the matter; they do appear, however, to have had notice of it, for it is mentioned in their own paper; and consequently, they cannot be said to be taken by surprise; but they may say they have been taken so far by surprise, as that matter had not been presented by the Counsel for the appellant in opening the case. I shall therefore give the learned Counsel an opportunity

of referring your Lordships to any thing, which may do away the effect of that circumstance; and if, in the result, I shall feel it to be possible to advise your Lordships to make a final decision here, without sending it to be tried by way of issue, I shall feel the strongest desire so to do. If the learned Counsel can show, by legal evidence, that Macartney had assumed to act for the Bank, and, without authority, had become a party acceding to the trust deed, it would be an explanation of the Bank afterwards having taken advantage of it, though I should say, still it would be difficult to say, that their conduct must not be taken to have been an adoption of the deed. Sept. 23, 1891.

Mr. Miller was heard on this point.

Lord Chancellor.—I would now move your Lordships that the further consideration of this case be postponed.

On a future day.

Lord Chancellor.—My Lords, this case arose under particular circumstances. The principal question—which, after the comments I made upon the case, is all that remains for consideration—was, whether or not I could, upon the evidence in the cause, safely advise your Lordships, as I was most anxious to do if I could, to decide the question finally here; or whether it must go back to an issue to be tried in the Court below? For I had the misfortune of not being able to take the same view of the case as the learned Judges who decided below, upon grounds which, in some respects, I cannot understand; and which in other respects, so far as I understand them, I do not assent to—that the appellant Mackenzie is, under his bond to the Commercial Bank, not merely a surety, but a principal debtor. My Lords, it is impossible for any lawyer to read this instrument, and to doubt for a moment that he is cautioner only. It is stated he binds himself with Geddes: For what? For the repayment of 500*l.* to be advanced to Geddes. In every respect, therefore, unless the word “cautioner” or some such technical word must of necessity be used upon all such occasions, and unless it is not sufficient for a man to state in other words what he means, it is impossible to doubt that this is a bond of caution. I put it to the learned Counsel at the bar, if he was asked what he had done for such a one whom he had assisted by signing such a bond, whether he would not describe himself by the word “cautioner?” Whether he would not answer, I am his cautioner in a cash account—I have given a bond of caution in a cash account. No different construction can be applied to this instrument, because it happens to be a bond for a cash account—a very common instrument. It would be very important, as far as the question of discussion goes, if I was asking your Lordships to declare, by your decision, that these parties

Sept. 13, 1831. were not co-obligors, but I say no such thing ; the bond is carefully, artificially, and successfully drawn, and most effectually excludes that construction. A party may be bound as a principal obligor, though not for himself, but for a benefit conferred upon the principal obligor. He is truly cautioner, but still he may not have the benefit of discussion ;—no bank would take this bond, if the benefit of discussion was implied—that benefit gives the cautioner a right to say, You have not discussed my principal: not merely, you have demanded and been refused ; but you should have gone against him by full diligence. There must be the fullest discussion ; he must be fully sold up, and every thing must be done that the obligee can do to get hold of his property. It would be a great disadvantage to any bank if this discussion were to exist, for their object is to have two persons instead of one ; so that though the principal debtor does not pay, the other must, as the co-principal. As the doctrine seemed to be considered of some importance, I have had a communication with the Court below upon this subject, and my opinion that this is a cautionary bond is entirely confirmed by the learned Judges with whom I have communicated. Then I hold Mackenzie to be a surety ; and being a surety, he has all the equities of a surety, and among those, that any act of the obligee giving time, or any advantage in the nature of time, to diminish the security of the surety, lets the surety off. That is the law of England, the common law of England, and it is the law of Scotland, and of every commercial country. One thing the Bank do, is parting with the shares ; the other thing is, the giving time by a superseding of the process for three years. Now, with respect to the parting with the shares, I do not say so much upon that, although I do not think it immaterial. Lord Cringletie, in an elaborate note upon this subject, considers that words are of no importance in an instrument, if they are words of common style. He does not rest the case upon this not being a bond of caution ; he does not give any opinion upon it, nor do the Judges (who however plainly treat Mackenzie as a cautioner) ; but he observes, “ the Lord Ordinary, however, does not think that the “ merits of the cause rest on this—he is of opinion that the clause in “ the bond was merely words of common style of such a deed, which “ is inserted in all such bonds, whether any of the parties happen to “ have any shares of the Bank stock, or not.”—But really, my Lords, I do not understand that a clause is to have no meaning, because it is inserted very often. “ Signed, sealed and delivered, in the presence of A. and B.,” as attesting witnesses, are words of common style ; half the bond is in words of common style ; but does it follow, because an instrument contains words often, nay, universally used for a certain purpose, that they are unmeaning and unavailing to ac-

Sept. 13, 1831.

comply with that purpose? The more words are used frequently, the more they have a legal import, and a legal importance. The words are, "And it is hereby declared, that there is nothing hereby meant to
 "supersede or vacate the security which the said Company already
 "hold or may hold over the shares which we or either of us hold
 "or may hold of the stock and profits of the said Company, for
 "any advances under this bond or otherwise, or to be advanced."

A doubt might be raised whether the Bank selling those shares, without working out their own security over them, and paying their balance out of the price, or without notice to the surety, did not operate in favour of the surety. But I am doubtful upon that subject; and upon that I am not disposed to differ so much from the Court below. It is upon the ground of the deed of accession and supersedere, by the creditors of Geddes, among whom, upon the face of the instrument, Macartney is expressly included as representing the Commercial Bank to the amount of 500*l.*, that being the only claim that the Bank had against Geddes's estate, namely, this very 500*l.* The Bank say, first, that they were no parties to the trust deed; secondly, that they were no parties to the deed of accession and supersedere; and thirdly, that Mackenzie has no right to complain of giving time, for he was present when this deed was executed, though it is not pretended he signed it—that he represented the Bank as their agent—that he had notice of it, and that he was a voluntary acceding party, and has no right to complain of it; and my Lord Cringletie plainly proceeds upon this view of the subject; for he says, "a draft of a deed of accession by the creditors was
 "also produced to the meeting, and the defender is entered upon
 "the minutes of that meeting as appearing for the behoof of the
 "pursuer, claiming as creditors on the bond by Geddes and himself." Now it is alarming to see such a thing as this stated. Here is a learned Judge, who gives a very elaborate decision, and yet he says, that the defender is entered upon the minutes as appearing for the behoof of the pursuers, as claiming creditors. My Lords, the learned Judges in the Court below should apply their minds to that without which no court can do justice, no court can avoid error, and no court ever discovered truth—I mean, the observing strictness in applying the rules of evidence. Lord Cringletie considers this to be evidence, that the appellant, Mackenzie, is agent for the Bank, and present at the important meeting, because there is a minute (which is very much praised in the pleadings, as being signed by a gentleman of high respectability, and incapable of putting his name to any thing that is not accurate,) stating that circumstance. That is the sort of rule by which a man's property is to be taken from him, and given to another by the

Sept. 19, 1891.

practice of Scotland. It is a minute made behind my back by a respectable man. I do not care how respectable he is. Three persons going to an ale-house, and signing a minute, that A.B. was present, and agreed to give up his claim to the equities he enjoys as a surety, and as an obligor in a bond, is to entirely conclude him, because they produce this minute signed by a respectable man. It never seems to have entered into the mind of his Lordship to doubt that this was the best possible evidence. You have a minute, forsooth. Why, if it had been a record of a judgment, it would not have bound me, if I had not claimed through one of the parties in the judgment; but, because it is a minute, signed by a respectable man, but not signed by me, and my authority, it is conclusive. To be sure there is evidence (and that is the only point which I have a doubt upon) of Mackenzie having put his initials to the draft of the trust deed, but that is only the draft of the deed. I may have intended to sign the deed, and afterwards have altered that intention. If so, I have not given time. But it is plain that a surety has an absolute right to be let off, if time is given to the principal by the obligee. If the surety himself gives time, he would defeat his equities to be let off; but if he intended only to give time, and did not do it, his equities enure to his benefit as much as ever. That time was given by the obligee by accession is no doubt a fact to be proved; and it is not pretended that the Bank signed the deed of trust and accession; and as to Murray's having signed, they certainly appear by the correspondence to be the Bank's agents, but as they were general agents they might be representing other clients, and thus not bind the Bank. But there is a most important statement in the papers of the Bank themselves, which clearly, in my humble judgment, makes it unnecessary for me to advise your Lordships, which I should otherwise do, to send the case back; the Bank admit, that they made an affidavit of the amount of the debt due by Geddes, and lodged a claim to that amount against his estate. How?—There was no sequestration against Geddes—there was no other trust deed against Geddes and therefore the Bank have set up this trust deed, and they have acted under it, and taken the benefit of it. It is true that they say they did it for the sake of the surety as well as themselves, in order to give him the full benefit of the claim, but that avails them little. They have, under the trust deed, made an affidavit of debt to the amount of 500*l.*, for which they are stated to be creditors in the introductory part of the trust deed, and it is too late to say that they will disaffirm that deed, or will have nothing more to do with it. They have approbated it, by lodging under it a claim against the estate, and cannot now be permitted to allege that they have not given time by the trust deed, and the supersedere

for three years. I do not go into the correspondence; this is a shorter ground for disposing of the case and upon these grounds; I move your Lordships that this judgment be reversed. Sept. 13, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellant's Authorities.—Bell's Com. B. 3, P. 1. c. 3. sec. 3; Ersk. III. 5. 11, III. 3, 66; Bowman Fleming, 23d May 1826; W. & S. Vol. III. p. 277. Thomson, 11th June 1824; 2 Shaw, p. 347; Grant, Dow, VI. p. 252; 3 Ersk. 66; Fell on Guar. p. 160; 3 Ersk. 366; Fell, p. 176; Stewart, 31st May 1814; Fac. Col. Leslie, 10th Jan. 1665 (2111); M'Millan, 11th Jan. 1729; 6 Geo. IV. c. 120, sec. 10.

Respondent's Authorities.—Hotchkis v. Royal Bank, 28th Feb. 1797.

RICHARDSON and CONNELL, — MONCRIEFF, WEBSTER,
and THOMSON, — Solicitors.

Sir MICHAEL SHAW STEWART Bart., Appellant.—*Lord Advocate* No. 41.
(Jeffrey)—*Knight*.

JAMES CORBET PORTERFIELD Esq., Respondent.—*Lushington*
—*Rutherford*.

Entail—Faculty—Prescription.—A party executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs male of the entailor's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailor's body; thereafter he made a deed whereby he altered the line of succession, and nominated heirs preferably to the heirs female of the institute, and to the other heirs called after the substitution *hæredibus nominandis*; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination:—Held (affirming the judgment of the Court of Session on a remit from the House of Lords), that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former.

In this case (the facts of which will be found ante, vol. ii. Sept. 23, 1831.
p. 369,) the Second Division of the Court of Session had (22d 2D DIVISION.
June 1820) found, "That Mr. Corbet Porterfield is entitled INNER HOUSE.
to be served heir of tailzie and provision under the brieves

Sept. 23, 1821. “ purchased by him ; and remit to the macers to proceed in the
 “ services accordingly, and to dismiss the brieves at the instance
 “ of Sir Michael Shaw Stewart, Baronet ; and afterwards (15th
 “ May 1821) adhered to that judgment.”*

On appeal, the House of Lords (24th May 1826) ordered,
 “ That the said cause be remitted back to the Court of Session in
 “ Scotland, to review generally the interlocutors complained
 “ of. And it is further ordered, that the Court to which this
 “ remit is made do require the opinion, in writing, of the other
 “ Judges of the Court of Session, on the whole matters and
 “ questions of law which may arise in this cause ; which Judges
 “ are to give and communicate the same ; and, after so reviewing
 “ the interlocutors complained of, the said Court do and decern
 “ in the said cause as may be just.” Under this remit the Court
 of Session, “ in order to their reviewing generally the inter-
 “ locutors complained of in the appeal, and providing otherwise,
 “ in pursuance of said judgment,” appointed parties to give in
 cases, and it was agreed and directed that the question, “ Whe-
 “ ther, on consideration of the whole pleas respectively urged by
 “ the parties, Sir Michael Shaw Stewart or Mr. Corbet Porter-
 “ field is entitled to be served under the competing brieves, or
 “ either of them ?” should be put to the consulted Judges.

The following opinions were returned :

*Lords President, Balgray, Craigie, Gillies, Corehouse, and
 Newton.*—“ The question proposed to the Court, namely,
 “ Whether Sir Michael Shaw Stewart or Mr. Corbet Porterfield
 “ is entitled to be served under the competing brieves, or either
 “ of them ?” appears to us to depend on the decision of two
 pleas in law on which parties are at issue :

1. “ Whether the instrument 1742, in so far as it calls Jean

* Sir Michael Stewart died on the 5th of August 1825, and the appeal was taken
 by his son Sir Michael, who also took out brieves for service as heir of tailzie and
 provision to Alexander Porterfield, last of Porterfield, in the same terms with the
 brieves purchased by his father. These brieves, which were directed to the sheriff,
 having been opposed by the respondent, the sheriff made avizandum to their Lord-
 ships of the Second Division, who (24th February 1826) “ In respect that under the
 “ former proceedings in the competition between the late Sir Michael Stewart and
 “ James Corbet Porterfield, the latter was found entitled to be served heir of tailzie
 “ and provision, and has since been actually infeft in and obtained possession of the
 “ estate of Porterfield,” remitted to the sheriff to dismiss the brieves.

Porterfield and the heirs male of her body to the succession of the estates which form the subject of competition, is inoperative from want of power in Alexander Porterfield, the maker? 2. Whether the claim of Mr. Porterfield under that instrument is extinguished by prescription? These pleas are now stated in the natural order of inquiry, but they can be discussed more conveniently by reversing that order.

“ If it can be shown that Jean Porterfield and the heirs male of her body held a place, within the years of prescription, as substitutes in the entail 1721, prior to the heirs female of the body of Boyd Porterfield, it is indisputable that their right cannot have been lost by prescription since that period, for William Porterfield and his nephew Boyd Porterfield possessed the estate of Duchal and Overmains by virtue of the investiture under the marriage contract 1721 alone, and therefore could not prescribe against their own title, which bore, in gremio, the sixth substitution to heirs to be named by the entailer, as well as the seventh to the heirs female to be born of his body. On the other hand, if Jean Porterfield and the heirs male of her body were not substitutes under the entail 1721, prior to the heirs female of the body of Boyd Porterfield, but were only entitled to demand execution of a new entail, calling them in that place, it is possible that that obligation, not having been enforced against the heirs in possession, may have been so extinguished.

“ According to the argument of Sir M. S. Stewart, if an investiture contains a substitution *hæredibus nominandis*, and a nomination is afterwards executed, the nominees are not heirs of the investiture unless the instrument of nomination shall be incorporated with it, or a service expedited under the nomination as a title, which he seems to think would render it part of the investiture. We are of opinion that that plea is not maintainable. It is an established principle in the law of Scotland, that heritable property can be conveyed only by certain forms of expression, importing the present disposal of the subject, as in the ordinary style of a procuratory of resignation or disposition; but if the appropriate form of expression is used, it may be effectually conveyed, not only to persons in existence, but to future and contingent persons, substituted to each other in a series of any length, and on that principle the law of entail is founded. In a destination of this nature it is immaterial by what descrip-

Sept. 23, 1831.

tion the substitutes are called, provided only that means are given to ascertain each as the succession opens to him. They may be designated as the heirs or descendants of persons known, or, without reference to propinquity, they may be pointed out by any other intelligible distinction. On the failure of prior substitutes, if the persons so characterised are in existence, they are entitled to take up the estates as heirs by service or precept of clare constat, as well as if they had been named in the entail. The clause of conveyance, although they were not in esse when it was framed, is the sole foundation of their right, for it is by the form of conveyance alone that the character of heir of provision or substitute can be impressed. A tailzie disponing to A. and his heirs male, followed by a declaration, that after the failure of A. and his heirs male B. and his heirs male should succeed, would be totally inoperative as to B. and his heirs, the words of conveyance being wanting; at least a service as heir would not be competent to B., though he might perhaps be entitled to recover on a decree of constitution and adjudication—in implement against the next heir, under the standing investiture, and in that way complete his right to the estate. But though uncertain and contingent persons may be heirs of tailzie when the succession opens to them, they must resort to that species of evidence which the nature of the case requires to satisfy the inquest that they are the objects of the destination. That evidence may be parole testimony, if the description given has reference to such facts as birth, marriage, or descent; or it may consist exclusively of written documents, if the substitute is designated by a quality susceptible only of that mode of probation; but in neither case is the evidence any part of the conveyance, which must be complete in itself, or totally inoperative.

“ One example of contingent conveyance, very frequent in practice, is a substitution in favour of persons to be afterwards named by the entailer. This is convenient, because it saves the trouble of executing a new entail — (a deed cumbrous and expensive, and of difficult preparation,) when additional substitutes are to be introduced, or the previous order of succession to be varied. The contingency is thus made to rest, not on extrinsic circumstances or events, independent of the entailer, but on a resolution to be afterwards formed in his own mind. There is

Sept. 23, 1831.

however no difference in principle between that and any other contingency by which the entailer may think fit to regulate his succession. In the case of a substitution *hæredibus nominandis*, as in every other case of substitution, the deed of entail, as a conveyance, must be complete in itself, and fit for the transmission of heritable property; while the instrument of nomination, which is not required to contain any conveyance, to impose any obligation, or to be prepared in any technical form, provided it be an authentic writing, is merely evidence that the condition of the previously existing grant is purified. This form of substitution occurs at an early period in the history of the law, and it is given by Dallas, the first and best of our writers on conveyancing, as part of the ordinary style of an entail. Mr. C. Porterfield has cited various cases from the records of this Court, in which persons have been served heirs of tailzie on producing to the inquest instruments of nomination as evidence that they were substitutes under an investiture so framed. Sir M. S. Stewart maintains, that a substitution *hæredibus nominandis* in an entail is identical with a reserved power to execute a substitution;—that the instrument of nomination is not the evidence of the nominee's right, but the source of it;—that, previous to the nomination, the substitution is a mere blank, and that the nomination, therefore, is a constituent and essential part of the conveyance, or investiture proceeding upon the conveyance. We are of opinion that these positions are entirely unfounded. It has been already observed, that a conveyance to an uncertain and non-existing person is valid, to the effect of constituting him heir of tailzie when he exists and is ascertained; whereas no deed or instrument can operate to that effect unless it contains dispositive and technical words; and that, in the case in question, the whole force of conveyance lies in the entail, the instrument of nomination requiring no words of disposal, and therefore in no respect savouring of the nature of a conveyance. In farther illustration, and as a decisive proof of this point, reference may be made to grants of honours before the union, which, in this respect, were exactly upon the same footing as lands, except that a grant of honours necessarily flowed from the Crown, and could not be extended, varied, or modified by a subject. But, in Scotland, “it was usual to obtain grants of honour, not only to the grantee and his heirs male and of tailzie, referring to the particular entail

Sept. 23, 1831. “ then made, but also to the heirs of tailzie whom he might there-
 “ after appoint to succeed him to his estate, and even to any
 “ person whom he should name to succeed him in his honours at
 “ any time in his life, or upon death-bed.” This is certified in
 the return of the Lords of Session to an order of the House of
 Lords in 1739. And the return bears, that, “ as it is impossible
 “ to trace through the records such nominations and appoint-
 “ ments, which, in some cases, may be valid, though not hitherto
 “ recorded, the Lords of Session are not able to give your Lord-
 “ ships any reasonable satisfaction touching the limitations of the
 “ peerages that are still continuing.” Accordingly, no doubt
 was ever entertained of the efficacy of such grants, and various
 peerages have been held under them. Now, the King is the
 sole fountain of honours, and cannot delegate the power of con-
 ferring them ; the royal grant, therefore, in these cases, was of
 necessity complete before the instrument of nomination was exe-
 cuted ; and the nomination, being the act of a subject, could form
 no part of it, nor serve any purpose, but to point out the indi-
 viduals to whom the honour so granted belonged.

“ Various attempts have been made by Sir Michael Shaw
 Stewart to distinguish the case of hæredes nominandi from that
 of other contingent heirs, but we are of opinion that all those
 attempts are unsuccessful. It is said that a disposition to an
 unborn heir involves but one contingency, whereas a disposition
 to the heir of a person to be named depends for effect on a
 double contingency, viz. 1. Whether a nomination shall be
 made ; and, 2. Whether the person nominated shall have an heir.
 But when it is once admitted that a contingent conveyance is
 effectual, and the whole law of tailzie rests on that principle, it
 matters not how many contingencies are combined to form the
 condition under which any substitute is called, and in practice
 such combinations are frequent. Next it is said that the
 nomination must accrue to the tailzie, and constitute a part of it,
 because it is necessarily an instrument in writing ; whereas parole
 proof is admissible, if the claim of the substitute rests on pro-
 pinquity, or any other circumstance extrinsic of the conveyance.
 Every condition under which a substitute is called must be
 proved to the inquest by that species of evidence of which it is
 susceptible. If it be a fact, as birth, marriage, or domicile, a
 proof prout de jure is competent ; if it be the possession of an

honour or office, a grant, patent, or record must be produced; Sept. 23, 1831.
 if it be connected with any landed right, it must be established by reference to the deed or instrument constituting that right; but the proof which brings an individual under the description of substitute must not be confounded with the substitution itself. Lastly, it is said that an instrument of nomination must be recorded in the register of entails to make it effectual against purchasers and creditors, from which it is inferred that the nomination is part of the entail. There is no authority for that assumption, except a recent decision of a Lord Ordinary, in the Outer House, in a question arising out of this entail. But admitting that decision to be well founded, the inference does not follow. The statute 1685 is remarkable for incorrectness of expression, and in consequence it has given rise to endless litigation. It nowhere provides that tailzies shall be recorded, but that the names of the maker of the tailzie, and of the heirs of tailzie shall be recorded, together with the general designations of the estates, the conditions and provisions, and the irritant and resolute clauses. Now, it is impossible that the names of heirs should be recorded, if they are not in existence at the time of recording. But the act being for the security of the public, it is expounded in the manner most beneficial for that purpose, and therefore it may be right to require, that when there is a relative instrument containing the names of the heirs, that that instrument, although no part of the tailzie, should also be recorded: This may be convenient for the security of creditors and purchasers; it falls within the provisions as well as the purview of the act, provisions which, in the ordinary case, cannot be literally complied with. But however the point may be decided, it does not in the least affect the question now under consideration.

“ Holding, therefore, that a substitution *hæredibus nominandis* is essentially different from a reserved power to alter the destination in an entail, with which Sir M. S. Stewart endeavours to confound it, and that the heirs named by virtue of such a substitution are entitled to serve under the original investiture, it remains for consideration whether Jean Porterfield and the heirs male of her body were nominees under the sixth substitution of the entail 1721, or whether, as Sir M. S. Stewart contends, their only claim, if they had a claim, rested on the power

Sept. 23, 1831. of alteration reserved in that deed. Any ambiguity on this point arises solely from the circumstance that Alexander Porterfield, instead of applying to a skilful conveyancer to prepare his settlement in 1742, employed a country practitioner, who, from want of experience or motives of economy, resolved to make one deed answer the purpose for which two should have been employed, and expressed in a short member of a short sentence that which would have required some pages fully and correctly to explain. Yet that clause, brief and general as it is, does not appear to us to produce serious ambiguity. The instrument in which it is contained is an entail of the estate of Blacksholm, termed the New Estate, of which Alexander Porterfield was the unlimited proprietor, and placed under no engagement whatever, and accordingly he settles it by a regular disposition, containing precept of sasine, on the series of heirs which he thought fit to call to his succession. But that disposition contains no conveyance of Duchal, which Alexander Porterfield, though no longer fiat of that estate, was unquestionably entitled to execute by virtue of his reserved power of alteration; neither does it impose any obligation on his representatives to execute such a conveyance. It leaves the investiture of Duchal untouched, but it declares that the order of succession set down for Blacksholm shall also be the order of succession for Duchal. Without a conveyance therefore, and without an obligation to convey, what can this declaration import, except that the heirs of Blacksholm are nominated the heirs of Duchal, a proceeding competent under the substitution *hæredibus nominandis*, but which, without that substitution, would have been totally inoperative?

“ Farther, it is particularly deserving of notice in this instrument, that when the entailer, in repeating the destination of Blacksholm, arrives at that substitution in which the heirs not previously named in the entail of Duchal are called nominatim to the succession of Blacksholm, and of consequence to that of Duchal also, he states in terminis that he does this, not by virtue of his reserved power to alter the investiture of Duchal, but of his reserved power to nominate under that investiture; “ and “ that because I reserved to myself a power to name the subsequent heirs of tailzie after my son, William Porterfield, and “ his heirs aforesaid.” It appears to us unreasonable to contend that the entailer, having reserved two powers, and declaring here

Sept. 23, 1831.

that he means to use the one, shall nevertheless be held to have used the other, and that not to support but to frustrate the object of the settlement. It has been said indeed that this expression applies only to the substitution in favour of the heirs male of Fullwood and Hapland, and not to the series of substitutions which follow them, but it appears to us that there is no ground for that observation. Since the entail refers to one of his reserved powers at the sixth substitution, being exactly that part of the deed where the exercise of power commences, it must be intended that the remaining substitutes are named in the exercise of the same power, because there is no subsequent reference to the other power; and this conclusion is the more satisfactory, because, as already observed, the form of expression in the preceding clause actually imports a nomination under the one power, and not an alteration under the other. In the deed 1742 there is a conveyance as well as an obligation to convey Blacksholm, but there is neither a conveyance nor an obligation to convey Duchal; there is simply a declaration that the heirs of Blacksholm shall be the heirs of Duchal.

“ Sir Michael Shaw Stewart founds chiefly on a clause in the deed 1742, which he represents as a declaration that Alexander Porterfield intended that the entail of Duchal should be altered. Having recited the destination of Duchal, he proceeds thus:—
 “ And being resolved to adject, eik, and add the saids new purchased lands” (Blacksholm) “ to my tailzied estate above specified,” (Duchal,) “ with and under the same clauses and provisions mentioned in the foresaid bond of tailzie, but with the alteration, change, and innovation of the order, course, and succession underwritten, which is hereby declared to be the order, course, and succession to my foresaid estates and lands, both old and new, with and under the additional clauses and provisions after specified: Therefore wit ye me,” &c. The entail expresses his will that the destination of Blacksholm should be different from the previous destination of Duchal, and that the destination of Blacksholm, so changed, should afterwards be observed in Duchal, which is plainly equivalent to saying that the destination of Duchal should be changed, and consequently it is inferred that he had resolved to exercise his power to alter the Duchal investiture, and not his power to nominate under it. We are of opinion that this is only an in-

Sept. 23, 1831.

genious attempt to catch at the words of the entailer in opposition to his will. The alteration of a substitution *hæredibus nominandis* into a substitution *hæredibus nominatis*, especially when that was done by a deed of conveyance, might with propriety be called a change of the Blacksholm destination from the Duchal destination; but when it is declared that in future both destinations should be the same, and when this could be effected, not by framing a new investiture of Duchal, but by holding the Blacksholm heirs nominees under the subsisting investiture of that estate, the form of expression on which Sir M. S. Stewart relies affords no inference bearing on the present question, for it must always be remembered, that it is only by that species of alteration in the line of descent, which requires an alteration of the investiture to give it effect, that the plea of prescription is let in. In common parlance, the destination may be said to be altered when a substitution *hæredibus nominandis* is converted into a substitution *hæredibus nominatis*, by means of an extrinsic instrument of nomination. But, until the present case occurred, it never was doubted that an heir serving under such a substitution, on the evidence of an instrument of nomination, was heir of the investiture and of the investiture alone, and we are of opinion that the doubt now raised is unfounded.

“ Taking this clause therefore in literal sense, it does not import that Alexander Porterfield intended the deed 1742 as an alteration of the Duchal investiture, or that the substitutes in question should not take as nominees; his intention evidently was the same as if he had executed two deeds, the one an entail of Blacksholm, the other a nomination of the heirs in it to be also heirs of Duchal. But farther, we think that the mode of construction resorted to by Sir M. S. Stewart, as applied to a mortis causâ deed, and more particularly a deed *ex facie* the work of an unskilful and uneducated conveyancer, is altogether unwarrantable. Such deeds are to be expounded so that the will of the maker shall be enforced, or, in the words of the maxim, *verba debent intelligi cum effectu, ut res magis valeat quam pereat*. There is no dispute here that Jean Porterfield and the heirs male of her body were the *hæredes prædilecti* of the entailer called to the estates whenever the succession opened to them, however distant that event might be. Considering the probability that a long period would elapse before the failure of

Sept. 23, 1831.

the prior heirs, it is not presumable that he would expose their right to the hazard of prescription, having so simple a mode of preventing it. His will being clear, and his power as clear, we do not think that one ambiguous phrase, supposing it ambiguous, should be made the ground of inference that he attempted to do in an uncertain and imperfect manner that which he might certainly and perfectly have accomplished. But in truth there is no ambiguity, for the context proves that a nomination was intended; the operative words expressly import nomination; there is a total absence both of actual alteration and the imposition of an obligation to alter. Holding Jean Porterfield and the heirs male of her body nominees under the substitution hæredibus nominandis in the entail 1721, which was the foundation of William Porterfield's investiture, and upon which Boyd Porterfield made up his title to Duchal, and possessed Overmains in apparency, we are of opinion that the possession of both of those individuals was a possession in favour of the remaining heirs of entail, and consequently that the right of Mr. Corbet Porterfield is neither excluded by the positive nor lost by the negative prescription.

“ The second plea maintained by Sir M. S. Stewart is, that the deed 1742, in so far as it calls Jean Porterfield and the heirs male of her body to the succession of Duchal, is null for want of power.

“ By the marriage contract 1721 Alexander Porterfield reserved power to regulate the succession of that estate, except in so far as the heirs of the body of his son William and the heirs male of his own body were concerned; but in the entail of Blacksholm in 1742, an estate entirely in his own power, he preferred the heirs female of his own body to the heirs female of William's body, and he declared at the same time that the succession should be the same in both estates. William never had heirs female of his body; but as they were in posse in 1742, it is said that this declaration was ultra vires of Alexander the entailer, and vitiated the whole nomination in reference to Duchal. We are of opinion, in the first place, that it was not the intention of Alexander, in the deed 1742, to prefer the heirs female of his own body to those of William's body in the estate of Duchal. In the narrative of that deed he recites the obligations contained in the contract 1721, and in particular he recites

Sept. 29, 1881. fully and distinctly the obligation in question, a recital inconsistent with the supposition of his intending to violate that obligation in the very next clause of the deed. It is true that he calls his own daughters and their issue male before the heirs female of William's body to the succession of Blacksholm, as he was entitled to do; it is also true, that in brief and general terms he appoints the succession in both estates to be the same; but, on the principles already explained, principles universally recognised in the exposition of deeds, that appointment must be construed *secundum subjectam materiam*, and the generality of the terms restricted by reference to the context. When he declares that the order of succession shall be the same in both estates, it must be construed that he intended it to be the same, only in so far as he had right and power to make it the same, and not in so far as he had neither right nor power to do so, as he had expressly admitted in the sentence immediately preceding. It is unnecessary to cite examples of such a construction in restricting general terms to a specific meaning, or otherwise modifying words which go beyond the will of the maker of the deed. They are familiar to every one acquainted with the practice of equity in this or any other civilized country; and recent cases in the law of entail, of great magnitude and importance, have been decided on that ground in this Court and in the House of Lords.

“ But granting in argument what it is impossible to admit in fact, that Alexander Porterfield intended by this deed to violate an obligation the subsistence of which he had so expressly declared, we are of opinion that an abortive attempt to confer the preference in question would not annul the deed, in so far as it was within his power. There is nothing to prevent a separation of the good substitutions from the bad, such separation being matter of daily practice in enforcing the provisions of entails. Many precedents might be referred to of this nature, and in particular that of Mackay against Lord Reay, alluded to in the argument for Sir Michael Shaw Stewart. In that case a destination in one part within and in another beyond the power of the entailer was sustained in part, and in part reduced. The distinction attempted to be taken by Sir Michael Shaw Stewart we consider unfounded. In the present case,—quoad the *jus disponendi*—the power of regulating the succession of the estate,

Alexander Porterfield was an absolute fiar, as much as Lord Reay was in the other case; both were restrained as to certain substitutions, and quoad ultra both were unlimited. If Alexander's power had been conferred by constitution instead of reservation, the case might have been different. We are of opinion, therefore, that there is no excess of power in the deed 1742 of the nature alleged by Sir Michael Shaw Stewart, and although there had, that it would have been immaterial in the present competition.

“ These views, which have been stated in reference to the lands of Duchal and Overmains, apply, à fortiori, to the superiorities of Porterfield and Hapland, to which Boyd Porterfield completed a feudal title, bearing express reference to the deed 1742.

“ Therefore, in answer to the question proposed, we are of opinion that Mr. Corbet Porterfield is entitled to be served heir to William Porterfield in the lands of Overmains, to Boyd Porterfield in the superiorities of Porterfield and Hapland, and to the late Alexander Porterfield in Duchal.”

Lord Mackenzie.—“ I had made up, as prefatory to my opinion, a statement of the circumstances of this case; but it is so long, and so little necessary where these circumstances are so fully and fairly before the Court, and have been stated so often already, that I prefer omitting this statement, and coming at once to the opinion which, after very full consideration, I continue to entertain.

“ 1. I shall, in the first place, endeavour to explain the view I have of the original nature and effect of the deeds 1721 and 1742.

“ Alexander Porterfield, under the deed 1721, had undoubtedly a power of nomination as well as of alteration. These were different in their nature, and in consequence of the base infestment taken, which carried the property, came to be different in their modes of operation. The power of nomination did not enable Alexander Porterfield to take out from the destination any heir or class of heirs, or to change their place in the destination, but merely to insert heirs at a particular part of the destination. The power of alteration enabled him to do any thing he pleased with the destination, so far as subject to that power, and most eminently to change the places of heirs or classes of heirs. Again, the power of alteration, after the base infestment had been taken, could not operate without new infestment. When

Sept. 23, 1881. an investiture is once constituted by infeftment, whether public or base, whatever power any person may have to alter the destination of it, that alteration cannot be completed without the extinction of this investiture, and the creation of a new one by new infeftment, with a destination agreeable to the alteration. Accordingly, Alexander Porterfield had provided for this by the obligation which he inserted, binding William Porterfield and his heirs to make up titles agreeably to any alteration of the destination he should make under his power to alter. It may be argued that this obligation was broader, and that it extended even to the power of nomination, not trusting to the efficiency even of that power without new investiture. But I do not think necessary to found upon that. This, at least, is clear, that, in relation to the power of alteration, it was necessary, because Alexander was himself divested of the fee, and had no power himself to obtain new infeftment. In regard to the power of nomination of heirs under the substitution *hæredibus nominandis*, I am inclined (though even here there are difficulties) to hold that the base infeftment had not a similar but a stronger effect. I am inclined to hold that the effect of the due execution of that power of nomination must have been, to communicate immediately to the heirs nominated under it the same benefit that was held by the heirs nominated in the other substitutions of the deed 1721, and that without any new infeftment being taken, or any occasion for exercise of the obligation to make up new titles imposed on William Porterfield and his heirs. When I consider the principles admitted into our feudal law in the constitution of rights by confirmation, and looking to the practice, so far as I have been able, I think that a substitution *hæredibus nominandis* in a feudal grant, on which infeftment has been taken, is not merely a power to name additional heirs to be brought into the investiture by new infeftment, nor even this power joined with an implied obligation on the superior granting the infeftment to receive these heirs (as in a regress), but is a power to the nominator actually to name heirs who shall take under the existing investiture, as if the superior himself had named them in the original grant before infeftment was taken upon it,—the deed of nomination thus connecting with the deed referring to it, and forming part of the completed investiture, along with the original grant and sasine, just as a base infeftment

that is confirmed by the proper superior does. This seems to be the view taken, not only in the Roxburghe entail, which was ratified by the Scotch Parliament, but in various other important deeds of the same kind, some of which have been stated by Mr. Porterfield, and others are in Dallas's Styles. In this way I think, that although a base infeftment was taken on the deed 1721, yet that if a proper nomination, in terms of the substitution hæredibus nominandis, had been made by Alexander Porterfield, this would immediately and of itself have qualified the infeftment 1721, and put the heirs so nominated in pari casu with the heirs nominated in the deed 1721 itself. Their right would still have been subject to the power of alteration (so far as it extended), and would still have been only the right of heirs under a base infeftment, but it would have been of the same sort in this respect as the right of the other heirs of the deed 1721, excepting in so far as these were exempted from the power of alteration by express provision of that deed. Sept. 23, 1891.

“ Another view has been taken, which (though certainly not without much diffidence) I feel myself not able to adopt. This is, that the deed of entail 1721, or any other similar deed having a substitution hæredibus nominandis, is in itself instantly a full and completed conveyance, even in respect to the destination of heirs; and that the after nomination of heirs is not at all of the nature of a continuation of or addition to the conveyance of right, but merely an extrinsic act, creating, in point of fact, persons, and evidence of the existence of persons, qualified to take under the previously completed substitution to a particular class of heirs called heirs nominandi, but in no degree adding to or qualifying the deed or investiture of conveyance itself, just as marriage and its consequences are extrinsic acts, creating persons qualified to take under substitutions to heirs male or female of the body, &c. I think this is going too far. It appears to me that the nomination, under a power to do so, of persons to be heirs of tailzie under a particular entail, can never be viewed as an act extrinsic to the entail; but that, whether executed immediately or at some distance of time, it must be viewed as a conveyance warranted by the original deed, forming the complement of that deed, and together with that deed constituting the whole entail. For this reason, I think that it is necessary that such nominations shall be provided to be made, and shall be made by a deed written and

Sept. 23, 1891. probative as part of the conveyance of land, and shall not be so provided or made as to be left to parole evidence, as extrinsic facts affecting the operation of the conveyance are, such as marriages, births, continuance in life of persons qualified to be heirs, deaths of other persons, &c.; and farther, I think it necessary to register such nominations under clauses in entails in the register of entails. Suppose, for instance, an estate entailed on A., whom failing, on the heirs to be named in a writing under the entailer's hand, I do not think that the act 1685 would be obeyed by producing nothing to the Court of Session, and putting nothing in the register of entails but this deed, containing the name of the disponent, and keeping the whole destination of heirs in a sealed paper, to be opened perhaps after many years. Still less do I think it would be competent to destine a landed estate to A. and heirs to be named by the disponent in any way he pleased, and then execute the nomination by a verbal declaration, and prove it by witnesses as a mere extrinsic fact, not forming part of the conveyance, or consequently requiring a probative writing to establish it. I cannot see that any such view as this was ever entertained by the makers of destinations *hæredibus nominandis*. In the Roxburghe case the nomination was undoubtedly viewed as a part of the conveyance, for it contained the entailing clauses. The same remark applies to the case of Crailing. In the case of Douglas it is expressly provided, that the deed of nomination is to be holden as if expressed in the original deed. The case of Rutherford, where an entail of one estate referred to the destination in the entail of another, is not exactly in point; but still of that case, as far as it affords any light, the same view must have been taken, for the entailing clauses are contained in the deed referred to.

“ So in the instrument given as a style by Dallas where the grant is, “ to any other person or persons to be destinat and
“ nominat by the said V. any time during his lifetime, even
“ on death-bed, by whatsoever writ or schedule apart under his
“ hand, (and which writ is declared by the said charter to be
“ as good and fundamental right and title to the said heirs of
“ tailzie so be destinat and appointed as said is, succeeding
“ heirs of tailzie in special, in the lands and estate after men-
“ tioned, and to be infest thereupon, as if they were expressed
“ by name and sirname therein.)” So in the style, page 592,

the grant is, “ to the heirs female, procreat or to be procreat Sept. 23, 1831.
 “ of his own body, or descending of his own body, (the eldest
 “ being always preferable, and succeeding without division,)
 “ whilks failzieing, to such persons, one or more, whilks the
 “ said S. J. N. has nominat and designed, or shall nominat,
 “ design, or subscribe (in any writ by him subscribed or to be
 “ subscribed), to be heirs of tailzie, and to succeed to him in
 “ the estate after mentioned, failzieing of heirs male and female
 “ descending of his own body, and with and under such pro-
 “ visions, conditions, and restrictions as to the said S. J. N.
 “ shall seem expedient, which the person so designed or to be
 “ designed shall be holden to perform and fulfil; and the
 “ said writ shall be als valid and sufficient as if in thir presents
 “ insert and ingrossed.” In the style, page 623, there is simply
 a destination hæredibus nominandis. All of these seem styles of
 signatures of entails of importance, and seem, if not the whole,
 the principal, having clause in favour of such heirs contained
 in Dallas.

“ These deeds appear to me to be quite consistent with the
 view I have adopted, and with that view only. Indeed, I think
 that this view is adopted in the very able case for Mr. Corbet
 Porterfield, where it is said, “ The deed of nomination, as soon
 “ as executed, accrues to, and in effect becomes a part of the
 “ original investiture;” and the case of Douglas is referred to
 as showing this.

“ Entertaining the view of the nature of a destination hære-
 dibus nominandis that I have above explained, I come to the
 question (an important one in this cause), whether the deed
 1742 can be regarded as a nomination at all, or so far as to avail
 the respondent.

I have already observed that Alexander Porterfield had in
 him two powers,—one of nomination of heirs under the branch
 of destination hæredibus nominandis, the other of alteration,
 innovation, and change. These powers were distinct and differ-
 ent. If he executed a nomination under that branch, this
 could not be regarded as an alteration, but as the completion of
 the destination provided in the original deed. So, if he executed
 an alteration, that could not be taken as a nomination under
 that branch, for, if so taken, it would no longer have been an
 alteration, and must necessarily have reduced the deed into a

Sept. 23, 1891.

state of the most absurd inconsistency, the altered part of the destination being thus made to remain in the deed after the alteration. In respect to the form of execution, these powers were equally distinguished. The execution of the power of nomination was of course to be by a deed declaring the entailer's intention to name and then naming heirs to take under the branch *hæredibus nominandis*, the alteration was by a deed declaring the entailer's intention to alter and altering the destination, which of course, by virtue of the obligation previously constituted in the deed 1721, bound William Porterfield and his heirs to make up new investitures accordingly.

“ With these observations I turn to the deed 1742; and I feel compelled to say, that though I have looked over that deed again and again, I cannot find any thing in it to show that Alexander Porterfield either intended to exercise or did exercise in it any power but that of alteration, and still less any power of nomination under the branch *hæredibus nominandis* that can avail in this question. In that deed, after a full narrative of the marriage contract and the acquisition of new land, the entailer proceeds:—“ And being resolved to adject, eik, and add the
“ saids new purchased lands to my tailzied estate above specified,
“ with and under the same clauses and provisions mentioned in
“ the foresaid bond of tailzie, but with the alteration, change,
“ and innovation of the order, course, and succession therein
“ contained and above repeated, in so far as is inconsistent
“ with the order, course, and succession under written, which is
“ hereby declared to be the order, course, and succession to my
“ foresaid estates and lands, both old and new, with and under
“ the additional clauses and provisions after specified.” Here is an express declaration of intention to make use of the power of “ alteration, change, and innovation,” but not a hint of any intention to make use of the power of nomination under the branch *hæredibus nominandis*. It has been argued, that the declaration here is the exercise of that power of nomination. That, however, seems to me impossible to be received; for I cannot understand how a man, saying I am to alter my destination, and when so altered declare it to extend to two estates can be held to have done any thing, or even expressed any intention, referable to a power distinct from that of alteration. Accordingly the deed proceeds, in conveying the newly-ac-

Sept. 23, 1831.

quired lands, to state the altered series of heirs who were to take both estates, but without any words implying that this series was to take the old estates as heirs named under the branch hæredibus nominandis. It is true, that after the words, “ And also with and under the express provisions, burdens, and conditions under written, hereby appointed to be contained in the writs and securities to follow hereupon, I bind and oblige me, my heirs and successors whatsoever, duly and validly to infest and sease the heirs male of the body of the said William Porterfield, lawfully procreate or to be procreate of his present or any subsequent marriage (secluding always the said William Porterfield himself from any succession to the said late purchased lands); and failzieing heirs male lawfully procreate or to be procreate of my said son’s body, Boyd Porterfield my grandson, and the heirs male lawfully to be procreate of his body; whilks failzieing, to the heirs male of the body of Alexander Porterfield of Fullwood, my uncle; whilks failzieing, to the heirs male of Gabriel Porterfield of Hapland, my cousin.” This deed interjects these words,— “ And that because I reserve to myself a power to name the subsequent heirs of tailzie after my son William Porterfield and his heirs as aforesaid; and that it is known that the estates of Fullwood and Hapland, by a clause in their several dispositions, are to return to the heirs male of my family, failzieing the heirs male of their families, by which my ancestor’s anxiety to preserve their estates and family in their own names and heirs male plainly appears.” But it rather seems to me that this reference to the power of nomination is for the purpose of stating the motives or reasons of the entailer only, not with any view to an exercise of that power, even in favour of the Porterfields of Fullwood and Hapland, and that even they are left to be brought in by new infestment in the way of alteration, which was perfectly competent and ordinary. And this at least seems clear, that these interjected words have no reference at all to the afterpart of the destination, which alone is of any consequence in the present question; it is manifestly the introduction of the Porterfields of Fullwood and Hapland only to which the words “ and that,” &c. have any application at all, whatever be contended to be their effect. Indeed, if these words afford any inference as to the other heirs, it must be, that in

Sept. 23, 1831. respect to them the power of nomination was not looked to, since the reference to it is confined to the Porterfields of Fullwood and Hapland only. If they are to be held as nominees under that clause by virtue of the reference to it, it appears that then they are so nominated in contrast to the rest of the series in relation to which no such reference is made. The deed proceeds, after these interjective words, to state the rest of the destination, which is in itself a complete destination, containing and exhausting, though under altered arrangements, the same series that were in the destination 1721, the order and course of which he had declared he was to alter. It will particularly be observed, that, with exception of the Porterfields of Fullwood and Hapland, and their heirs, the destination in this deed 1742 contains no new heirs, but merely new-arranges those that were in the deed 1721, nor does it omit any that were in that deed. Then this altered destination closes with "the nearest heirs and assignees of the said William Porterfield whatsoever," contemplating that here the destination of the entail was to terminate, and most undoubtedly not contemplating that the part of the altered destination 1721, which came after the branch of *hæredibus nominandi* (in that deed) was to remain and come in after heirs whatsoever, and after the very same heirs contained in that part of the destination 1721 had been called already in the altered destination before heirs whatsoever, which must however have taken place if this deed was to operate as a nomination. It is not said that in the rest of this deed there is one word pointing at any exercise of the power of nomination. It may be further observed, that it could be of no use to mingle together the exercise of these two different powers. The deed 1742 being indubitably to some extent an alteration of the entail 1721, that required new infeftment to make it effectual. If new infeftment was to be taken at all, why not include it in the whole destination, or of what use could it be to leave part of it to operate in a way different from the rest? On the whole, then, I think that this is a deed of alteration merely, and neither intended nor expressed at all as a deed of nomination under the substitution of *hæredes nominandi*; and, *à fortiori*, I think that it is a deed of alteration only in respect to all the heirs excepting the Porterfields of Fullwood and Hapland, *i. e.* all the heirs in relation to whom the question is of any im-

Sept. 23, 1831.

portance in this cause. The question then comes to be, whether when a party having two powers, one of nomination, the other of alteration, executes a deed appearing to be intended and expressed only as an alteration, this deed shall nevertheless be held to be a nomination under a particular clause, in order that it may have effect as such, in case it shall by prescription or otherwise lose its effect as an alteration? And I feel obliged to answer this question in the negative. I cannot make the deed other than what the party himself intended to make it and has made it. If I were to do so, I never can be sure that I do not produce an effect which the maker intended should not be produced, and I am quite sure that I must produce it in a way he did not choose to adopt. I should do for him *quod non fecit* at least.

“ I have already observed, that supposing the insertion of certain new heirs, and the expression by Alexander Porterfield of his reasons for naming them, could be regarded as an exercise of the power of naming heirs under the substitution *hæredibus nominandis*, yet this could go no further than the appointment of these new heirs. The insertion of these new heirs, with a special reference to the power of nomination, could never convert into a mere nomination of new heirs, under such substitution, the whole of the rest of the destination, which contains nothing else but a new arrangement of the order of succession among the old heirs, made without any such special reference, but, on the contrary, made after a preamble that he was to exercise his right of alteration. Unless, however, the whole destination 1742 can be made nomination under the substitution *hæredibus nominandis*, it seems plain that the substitution of Jean Porterfield and the heirs male of her body, in virtue of which the respondent claims, can as little be made such as any other part of it. She and the heirs male of her body were just like all the others, excepting those of Fullwood and Hapland, *i. e.* they had been called before in the deed 1721, though not in the same manner nor in the same place. Even if we could view part of the destinations 1742 as nomination under the substitution *hæredibus nominandis*, the calling of this lady and her heirs male can never be held as included in that part, in which case the argument for nomination is one which the respondent has no interest to maintain. It is asked whether, supposing there had been no other power reserved

Sept. 23, 1831.

to Alexander Porterfield than that of naming heirs, this deed 1742 must not have been sustained as a nomination? I do not think it material to answer that question, because it supposes a case essentially different from the actual case, and one that I think really not possible to have happened; I mean, that I think it not possible that any man, having merely a power of nominating heirs under one branch of a destination, should have executed a deed in such terms as this.

“ 2. Viewing the deed 1742, then, as an alteration of the deed 1721, not as a nomination under the substitution *hæredibus nominandis*, at any rate not as a nomination under that power in respect to any heirs but the Porterfields of Fullwood and Hapland, which could be of no moment in this cause; the next question is, whether that alteration can be availing to the respondent in this process? Now, in so far as relates to the superiorities of Porterfield and Hapland, the alteration seems fully operative, for it appears to have passed into the investiture by the titles made up in 1773, which stand unreduced as yet, and I think are now not reducible. Under these titles, forming the investiture in these estates, the respondent seems to be the heir entitled to succeed; and as the process before us is a competition of brieves, it appears to me that he is entitled to be preferred therein. So far as relates to these subjects, I concur in the opinions of the Second Division of the Court.

“ In regard to Duchal and Overmains, the observation recurs, that the process before us is a competition of brieves for service under the existing investiture. Now the existing investiture as to Overmains is under the deed 1721, and base infeftment thereon merely, and of course the alteration can have no effect in the competition for being served heir as to Overmains. And then it is not denied that the appellant, not the respondent, is the preferable heir under the infeftment, if held to stand unaltered by the deed 1742. In respect to Duchal, the existing investiture is under the deed 1721, and infeftment thereon, and the confirmation of that base infeftment, which confirmation is wholly without mention of any alteration whatever. Of course, therefore, that alteration can be of no effect in this competition of brieves, in so far as respects Duchal, any more than in respect to Overmains; so that, taking the investiture as it stands under the infeftment 1721, and holding it to be unaffected by the deed

1742, the appellant is the preferable heir under that investiture to Duchal as well as to Overmains. On these grounds, without going further, I think that, in relation to Overmains and Duchal, the interlocutors should be altered, and the appellant preferred in the competition. Sept. 23, 1831.

“ In this view, it is perhaps not necessary to enter into the question respecting the original validity of the alteration, or its liability to prescription. As the question has however been fully argued, I must say,—

“ 1. That I think the alteration was certainly not valid in toto, but that I think the bad part of it separable. *i. e.* the alteration, in so far as related to the heirs female of William Porterfield. Over these heirs Alexander Porterfield in 1742 had no power, and therefore his express insertion of them in a latter place of the destination, and his expunging of them from their proper place, must both be held as null. But, with this correction, I think the rest of the alteration might have originally been made effectual.

“ 2. That in respect to prescription, I do not see how there could be any prescription during the life of Alexander Porterfield, who held the power of alteration during his life. Till his death it was never finally exercised, nor could be operative. On his death there appears to have been an immediate obligation binding William Porterfield and his heirs to make up titles agreeably to the alteration, which was liable to the negative prescription, like any other obligation, provided there existed in the obligee a sufficient interest to prescribe against it. And I think William Porterfield had a sufficient interest, as merely heir of entail in possession, in as far as the alteration brought in additional substitutes of entail, every heir of entail having an interest to get rid of after-substitutes of entail as far as he can, and particularly an heir in whose heirs and assignees generally the destination terminates. And further, William Porterfield had a sufficient interest to prescribe, in as far as by the alteration his own heirs female were postponed to a number of heirs who previously were postponed to them, or not in the entail at all. Boyd Porterfield had interests just similar to those of William, *i. e.* to get rid of the additional substitutes, and also of the postponement of his own heirs female to other heirs, who in the original entail stood postponed to them. Alexander Porterfield, 2d,

Sept. 23, 1881. seems also to have had similar interests to prescribe. Perhaps it may be held that the first of these interests was extinguished by the deaths, without issue, of Porterfield of Fullwood and Porterfield of Hapland, at some time not precisely stated; but at least the other interest remained all along. I do not therefore think it necessary to inquire whether, independently of any special interest of this kind, an heir of entail in possession upon an investiture destined to himself and any set of heirs of entail, and bound by an obligation to obtain new infeftment in favour of himself and any other set of heirs of entail, has not, from the very circumstance that this is an obligation to do what is not for his own advantage, and whether he chooses or not, sufficient interest for extinguishing it by prescription, if he shall choose not to fulfil or to acknowledge it? I certainly feel inclined to answer the question in the affirmative; but it is not necessary to decide upon that general and abstract view here. I may observe, however, that I do not think the case of Welsh in point, that case having been considered as one in which there was no immediate obligation to take new infeftment, but only to hold the estate on the title of the entail, which was held to have been sufficiently done. I think, then, that the obligation to execute the alteration was liable to and is lost by the negative prescription; and in that case the obligation must perish altogether, since the alteration is not made, and nobody is bound to make it.

“ The opinion which I have yet given, it will be observed, is applicable to the deed 1742, viewed as an alteration only, not on the supposition that it could be regarded as a nomination under the substitution *hæredibus nominandis*. In that view the case assumes an aspect somewhat different. In that view I consider the two deeds 1721 and 1742 as forming two parts of the entail of Duchal, &c. left by Alexander Porterfield. These parts I consider both as conveyances, not as mere evidence of any fact intrinsic, to the conveyance of entail. Then I consider these deeds so far distinct deeds, that the existence and full effect of the first nowise depends upon or necessarily implies the existence of the second. The deed 1721, even in this view, was a sufficient effective settlement in itself, an entail liable to no objection on that account, although no such deed as that of 1742, nor any nomination under the power of nomination, ever had been

executed. The deed 1742 was executed, and I shall suppose Sept. 29, 1831. was immediately operative as a nomination of heirs under the power of nomination in the deed 1721; yet still the deed 1721 remained a deed in itself *ex facie* sufficient and valid as a title to the estate, and therefore a perfectly good ground of positive prescription, provided it was followed with proper possession attributable to it alone, exclusive of any other, and particularly of the deed 1742. Then I think that, in respect of Duchal, a title by infestment was made up by Boyd Porterfield in 1757 under the deed 1721 alone, omitting all mention of the deed 1742, and the like title was continued after him by Alexander Porterfield; and on this title the peaceable possession continued to be held by these parties down to 1815, when this competition arose. I think, therefore, that in relation to these lands the positive prescription took place, for I see no reason to doubt that an heir of entail, peaceably possessing lands for forty years upon an entailed infestment to himself and a certain class of heirs, prescribes positively in favour of himself and that sort of heirs, whether against a stranger asserting a right to the estate superior to that of the entailer, or against any other party, alleged disponent or alleged heir, pretending right contrary to that infestment, and to the disadvantage of the possessor or the heirs of the infestment. In regard to these last in particular, I cannot see that it makes any material difference whether they claim under a new disposition or obligation of entail, for which it is alleged the entail left power, or under a deed of nomination, for which it is alleged the entail left power. The positive prescription seems to me equally to exclude all such pretensions to disturb the existing investiture. The reasons of the statute of prescription, particularly the danger of forgery, apply just as much to one as the other. It is argued by Mr. Corbet Porterfield, indeed, that the possession must be ascribed, not to the deed 1721 alone, but to it as qualified by the deed 1742; and no doubt, if that were the case, there would be no prescription. But I cannot adopt that view. I do indeed think that an heir of entail may serve, or take a precept of *clare constat*, under a nomination of heirs, for which room has been preserved by a destination *hæredibus nominandis*; but then he must do what has been done in the case of Roxburghe, and other cases of that sort, *i. e.* his service or precept of *clare* must mention the deed of nomination, not merely mention

Sept. 23, 1831.

the deed containing power to make the nomination, which is a quite different thing from the existence of a deed in actual exercise of that power. If nothing is mentioned in a service, or precept of clare constat, but a deed with a substitution hæredibus nominandis, it seems that the inference must be, that the service is a service, or precept of clare constat, under that deed only containing the power, but not under any deed containing an actual exercise of that power. I cannot, therefore, adopt the argument of Mr. Porterfield on this point. I do not consider the case of Douglas to be applicable, since in that case there was mention (which, though vague, was held sufficient for designation,) of the deed of nomination actually executed under the power.

“ In regard to Overmains, in this view of the nature of the deed 1742 as a nomination merely, the case seems different. It does not appear that any title was ever made up to these lands excluding the deed 1742. Base infestment indeed was taken of these lands on the deed 1721 when it was first granted, and before the deed 1742 existed; and this was afterwards confirmed by the superior, without any mention of any actual deed of nomination; but I do not consider that as exclusive of any subsequent deed of nomination to be executed by Alexander Porterfield. There is some difficulty in this; but I think I can go so far as to hold that a superior, giving a charter to a person and the heirs to be named by him in a subsequent deed, does grant an infestment that does invest those heirs (as such) when the nomination is finally left effectual. That is quite a different thing from a service and infestment after a nomination has been made, taking no notice of it, but only mentioning the deed containing a clause of power to make such nomination. In the former case the superior makes all the mention of the nomination that can possibly be made, *i. e.* he mentions it as a deed to be made in future. In the latter case the service, though the deed of nomination has actually been made, makes no mention of any such deed having been made or existing, but speaks only of the deed, with the clause of power to nominate, exactly as it would have spoken if no such nomination had ever been made. I do not think therefore that there is any inconsistency in holding that the nomination in the one case is excluded, and not in the other. It is true that afterwards, in 1746, William Porterfield took confirmation of the deed 1721, and infestment on it, without mention of the

Sept. 23, 1831.

deed 1742; and I do think that this confirmation was exclusive of the latter deed; but then I conceive that the prior base infestment, though not confirmed, continued to exist, and has never been in any way extinguished, but now (in this view of the deed 1742) is availing to Mr. Porterfield as heir of William Porterfield, in which capacity he now claims. In this view, then, of the deed 1742, as a mere nomination, I think there is no room for prescription as to Overmains, and in respect to it Mr. Porterfield must prevail; but I need hardly repeat that I do not myself adopt that view of the deed 1742. In respect to the superiorities, I do not see that the adoption of this view of the deed 1742 makes any difference."

Lord Meadowbank.—"I concur in every part of the judgment as delivered by Lord Mackenzie."

Lord Medwyn.—"I concur in the foregoing opinion, in so far as it considers the deed of 1742 as an exercise of the power of alteration reserved by Alexander Porterfield in the marriage contract 1721, except perhaps as to the nomination of the heirs male of Fullwood and Hapland,—and that it is not to be held as the filling up of what has been termed the sixth substitution by the nomination of heirs between the heirs female of his son William's body and the heirs female of his own body; and as to the result deducible from this, that Sir Michael Shaw Stewart is entitled to be preferred in this competition so far as regards the estates of Duchal and Overmains. Perhaps I do not differ materially from the views contained in the latter part of the opinion; but as it is unnecessary to enter upon them in consequence of the view I take of the deed 1742, that it is an exercise of the power of alteration, I rather wish to decline offering any opinion as to the consequences of the alteration having gone beyond the powers reserved in the deed 1721, and as to what would be the effect of the deed 1742 on the rights of the parties, viewing it as a nomination under the substitution hæredibus nominandis."

Lord Cringletie.—"The question now before the Court is relative to the estate of Porterfield, the succession to which was claimed by Sir Michael Shaw Stewart in opposition to James Corbet, Esquire. The Lords of the Second Division decided in favour of the latter; and, on appeal by the former, the House of Lords remitted to the Court to reconsider the question, and to require the opinions in writing of the other Judges of this

Sept. 23, 1831.

Court. In obedience to this remit, the Second Division have required the opinions in writing of the Judges of the First, and the permanent Lords Ordinary, on the question which of the two competitors is entitled to be served heir under the brieves respectively taken out by them from Chancery.

“ In compliance with this requisition, Lord Cringletie offers the following opinion :—The matter in dispute is purely a question inter hæredes, arising out of the settlements of Alexander Porterfield of Porterfield, and therefore is to be decided according to the will of the granter of these deeds, in so far as it is not opposed by conflicting principles of law. Alexander Porterfield of Porterfield had a son named William who was married to Miss Juliana Steel, daughter of the Rev. William Steel, minister of the parish of Lochmaben. On that occasion a contract of marriage, dated 19th and 21st October 1721, was executed by the parties, in which Alexander Porterfield disposed his estates of Duchal, Overmains, and the superiorities of Porterfield and Hapland, to himself, in life-rent and in fee, to the following series of heirs, viz.

“ 1. To his said son William and the heirs male of the marriage. 2. To heirs male of William by any other marriage. 3. To heirs male of Alexander’s own body. 4. To the eldest heir female of William’s body. 5. To the next heir female successive of William’s body. 6. Whilks failing, any other heirs of tailzie to be nominated by the said Alexander Porterfield by writ under his hand at any time in his lifetime, in his liege poustie ; which failing, 7. To the eldest heir female of the body of the entailer. 8. To his next heir female successive. 9. To heirs whatsoever.

“ Alexander also reserved to himself, at any time of his life, while in liege poustie, power “ to alter, innovate, or change the “ order, or course and succession, of the haill heirs of tailzie “ above specified, except the heirs male and female of his son’s “ body, and the heirs male descending of the said Alexander “ Porterfield, his own body,” &c.

And it was declared in said contract, “ That the said William “ Porterfield, and his heirs and successors, shall be obliged to “ take the rights, securities, and infeftments of the said haill “ lands and others above mentioned, with the burden of the “ irritancies and provisions herein contained, to and in favours of

Sept. 23, 1881.

“ such heirs of tailzie as the said Alexander Porterfield shall so
 “ nominate and appoint, failing the heirs male and female of
 “ the said William Porterfield, his body, and the heirs male
 “ of the said Alexander Porterfield, as said is,” &c. From this
 deed it appears that Alexander Porterfield reserved two powers,
 viz. one to interpose heirs between the heirs female of his son’s
 body and those of his own body ; and, 2d, to alter the course of
 the latter’s succession entirely. But in both cases he describes
 the exercise of the faculty as a nomination of heirs ; for, in the
 clause last quoted, William and the heirs succeeding to him
 are taken bound to take the investitures of the lands “ to and
 “ in favour of such heirs of tailzie as the said Alexander Porter-
 “ field shall so nominate and appoint.” This clause imme-
 diately follows the power to alter the course of succession in
 the manner before mentioned ; so that it is quite clear that, in
 the understanding of parties, the deed to be executed by Alex-
 ander, in whatever form conceived, was held to be a nomination
 of heirs, whether it was made under the one power or the other.
 Alexander married a second wife ; and, having acquired the
 lands of Blacksholm, he executed a deed, dated 5th November
 1742, wherein, after reciting the two powers reserved to him in
 his son’s contract of marriage, he subsumes that, since the date
 thereof, he had acquired said lands last mentioned, and some
 others which he was resolved to add to his other estate ; “ but
 “ with the alteration, change, and innovation of the order, course,
 “ and succession therein (viz. the contract of marriage) con-
 “ tained and above repeated, in so far as is inconsistent with the
 “ order, course, and succession under written, which is hereby
 “ declared to be the order, course, and succession to my foresaid
 “ estates and lands, both old and new,” &c.

“ He therefore disposed, under all the clauses of a strict entail,
 his lands of Blacksholm,—1. To the heirs male of his son Wil-
 liam’s body (secluding William himself) ; which failing,—2. To
 the entailer’s grandson, Boyd Porterfield, by his second son
 John, and the heirs male of Boyd’s body. 3. To the heirs male
 of the body of Alexander Porterfield of Fullwood. 4. To the
 heirs male of the body of Gabriel Porterfield of Hapland ; and
 that, “ because I reserve to myself a power to name the subse-
 “ quent heirs of tailzie after my son William Porterfield, and

Sept. 23, 1831. “his heirs as aforesaid,” &c. 5. To the entailor’s own daughters in their order of seniority, and the heirs male of their bodies. 6. To the heirs female of his son William’s body, and the heirs of their bodies. 7. Which failing, to the heirs female of Boyd’s body, and the descendant of their bodies, of whom Sir Michael S. Stewart is one.

“From the above detail these observations occur :—1. That Alexander exceeded the power reserved to him, in so far as he postponed the heirs female to be procreated of his son William’s body to the heirs of the bodies of Alexander and Gabriel Porterfields, and to his own daughters and the heirs of their bodies; so that had any heirs female of William’s body existed, it is quite clear that they had a right to challenge that deed of their grandfather, in so far as respected the lands specified in the contract of marriage; but it is equally clear that, if they had done so, they must have abandoned Blacksholm, because their grandfather was entitled to dispose of it ad libitum, and in the succession to it they were postponed to the others already mentioned. 2. It is equally clear that, in so far as regarded the heirs female of Alexander’s own body, he was under no restraint to interpose other heirs before them; and when I look to the deed 1742 I do not think that there is any alteration of the course of succession in the contract 1721, except the postponement of the heirs female of William’s body. To that extent there can be no doubt there is an alteration which might have been set aside by these ladies if they had existed. Quoad ultra, the deed 1742 merely interposes other heirs between the heirs of William’s body and the heirs female of Alexander’s own body by calling his own daughters before those of his son Boyd, and adds after them a few more heirs, which is a nomination, and cannot be called an alteration.

“Alexander died 14th May 1743; soon after which the deed 1742 was recorded in the books of this Court, but by whom is unknown. William was infeft, on the precept of sasine in the marriage contract, in the lands of Duchal and Overmains, and obtained from Lord Glencairn, the superior of Duchal, a charter in 1746, confirming the contract of marriage and subsequent infeftment, the effect of which was merely to convert the base holding into a public one. As to the lands of Overmains, he

possessed them on apparency. Porterfield and Hapland being mere superiorities holding of the Crown, William made up no titles to them. Sept. 23, 1831.

“ William died in 1752 without issue, when he was succeeded by his nephew Boyd, who made up titles to Duchal by serving heir of tailzie to his uncle under the marriage contract, and taking a precept of clare constat from Lord Glencairn, referring to the infeftment and destination hæredibus nominandis therein contained, but without taking any notice of the deed 1742, which had not then come into operation, in respect that Boyd Porterfield was entitled to succeed before any of the heirs newly called by that deed, viz. the heirs male of Fullwood and Hapland, or the tailzier's own daughters and the heirs male of their bodies. With regard to Overmains, he possessed it in a state of apparency, as heir of his uncle, under the sasine taken on the contract of marriage.

“ As to Blacksholm, Boyd entirely disregarded the deed 1742. He served himself heir of line to his grandfather—took thereby the procuratory of resignation in the disposition to that gentleman—passed a charter thereon—was infeft and held the lands in fee simple; so that the investiture being now secured by prescription, there is no question about these lands.

“ The superiorities of Porterfield and Hapland were taken up by Boyd, who, of the same date with his service as heir of line, also served himself heir of tailzie and provision of his uncle William, by which he got right to the unexecuted procuratory of resignation of these lands in the marriage contract; and he obtained a charter of resignation from the Crown, dated 6th August 1773, granting these subjects to him, and the heirs particularly called by the deed 1742, which is expressly referred to in the charter; and on this he was infeft 14th January 1774. Boyd Porterfield died in 1795, and was succeeded by his son Alexander, who completed his titles to Duchal precisely as his father had done, without reference to the deed 1742. I understand that he possessed Overmains on apparency, and made up no titles to Porterfield and Hapland; but he was enrolled as apparent heir to his father Boyd, on which occasion he produced and founded on the said Crown charter and sasine.

“ He died in 1815 without issue; after which arose the present competition between Sir Michael Shaw Stewart, as eldest heir

Sept. 23, 1831. female of the entailor's body, being the son of Boyd Porterfield's eldest daughter, and the late Mr. Corbet, the grandson and heir male of the entailor's eldest daughter.

“ It is said that the quæquidem of the charter to Boyd Porterfield sets forth that he had right to the unexecuted procuratory of resignation in the contract of marriage in virtue of his service as heir of line to his grandfather, which rendered the charter inept, as he ought to have taken the charter to himself as heir of tailzie and provision. There can be no doubt of the blunder, which might have been objected to in proper time; but I apprehend that this defect may be and has been wiped away by the positive prescription; for, if the service as heir of line did not give him a title to the unexecuted procuratory of resignation, the charter, granted on the narrative that it did confer a right, is still a prescriptive title; it is surely no worse than a charter granted à non domino, which will be a good title if followed by possession for the prescriptive period. In this way I think that the succession to Porterfield and Hapland devolves to Mr. Corbet in virtue of the order of succession contained in Boyd's charter, passed on the deed 1742.

“ As to Duchal, Sir Michael Shaw Stewart pleads, 1st, That the deed 1742 is not to be considered as one of nomination, in terms of the reserved power to interpose heirs between the heirs of William Porterfield's body and the heirs female of Alexander's own body, but as one of alteration of the order of succession, made in consequence of the reserved faculty to alter; that the alteration was ultra vires of Alexander, in so far as it postponed the succession of William's daughters to the other heirs preferred to them; and, being ultra vires to that extent, is altogether void and null.

“ If this were well founded, there would be an end of the question; Sir Michael must be preferred in this competition. But I cannot assent to the proposition that the deed is ipso facto void and null. I think that it was only reducible at the instance of the party injured by it, if they had existed; and if that party did not choose to challenge it, or if they had chosen to ratify it, I think that it would have made an additional nomination to the destination in the contract 1721. Put the case that Alexander Porterfield the entailor had died, having no children but William; that the latter had no sons, but had left daughters; these

might have set aside the deed 1742, and taken all the lands in the contract 1721 ; but, if they did not choose to quarrel it, I think that the first male heir called by it might have served heir of provision under that contract, as enlarged by the deed 1742, and the title would have been good. But that could not be the case if the deed was absolutely null. It seems a solecism to say that a nullity cannot be ratified. What is reducible only may be ratified, but what is ipso facto null is no better than a blank sheet of paper, and cannot be ratified. This satisfies me that the deed 1742 was not null, but reducible only, and that by those only who were injured by it. Quoad ultra, the granter had a right to make it, and nothing is so simple as to separate the challengeable from the unchallengeable in it. The heirs female of William's body, if they had existed, might have set aside the deed, in so far as it was to their prejudice, and when they became all extinct the nomination would take effect ; nor is there any thing more outré in this than the succession of heirs general to the last heir of entail, which, in a long order of succession, may not happen till at the end of 200 years. As, therefore, the said heirs female never existed, whereby there could be no challenge of the deed 1742, I think that, even viewing it as a deed of alteration in so far as they are concerned, it is otherwise unexceptionable, if it be not cut off by prescription.

“ But, farther, it occurs to me that the deed 1742 has a double character, and was so intended by the granter. Of this there can be no doubt, for he says so himself ; he quotes both the reserved powers in the contract, viz. the one to name the heirs who shall succeed on the heirs male and female of William's body and the heirs male of his own, and the other to alter the order and course of succession, as the inductive cause of executing the deed. Now, the only alteration was that which, even according to Sir Michael Stewart, Alexander had no power to make, viz. the postponement of the heirs female of William's body. Let that be laid out of the question, and the rest of the order of succession is truly a nomination or interposition of heirs between the 5th and 7th substitutions ; for he called the heirs male of the bodies of his uncle and cousin, and, failing them, his own daughters, before those of his son or grandson. The deed was therefore an alteration improperly done, and a nomination which he had full powers to make, for I think no one can

Sept. 23, 1831. deny that by the deed 1742 the respondent and his class of heirs were called to the succession of Duchal in preference to the tailzie's heirs female, because he declared the order of succession to be the same to both estates; and what was that but a nomination of heirs? I have always understood that, when a person executes an entail, in which he makes a perfectly feudal and technical conveyance of his estate to certain heirs therein named, whom failing, to any others whom he may afterwards appoint to succeed, he is entitled to call additional heirs by a separate deed, which he can competently declare shall be held to be a part of his tailzie, and as such to be observed by the heirs succeeding to him; and that it would be competent to the heirs called in that separate deed to insist that, on the renewal of the tailzied investitures, the nomination of heirs, or the order of succession made by the separate deed, shall be engrossed in them. Now this proves beyond dispute that the nomination by a separate deed is lawful and competent; but, although the nomination should not be engrossed in the titles of the prior heirs, that circumstance surely would not prevent an heir in the separate deed, as soon as the succession opened to him, from claiming to be served, and producing the deed as evidence of his right, provided that the right of succession under that separate deed has not been lost by prescription, to which I shall advert in the sequel. To me this seems quite clear; but to illustrate it, put the case, that an entailer calls his son and the heirs of his body, whom failing, A. and the heirs of his body; whom failing, such other heirs as he should afterwards name, and reserving full power to change the places of the different heirs by a separate writing under his hand; and suppose that he chooses to prefer B. to A., and executes a separate deed for that purpose, and that, at his own death, his son has been dead without children, can there be any doubt that B. could claim to be served heir to him under the investitures taken on the tailzie, and produce the separate deed naming himself, and preferring him to A.? I imagine there can be none. What else was the case of Rutherford? Sir Alexander Don took the investitures of that estate to his second son Alexander, and certain other heirs specified; whom failing, to the heirs contained in the tailzie of Newton. What else was this than a destination to heirs designated in a separate deed? There is surely no difference, and this was found

to be sufficient both in this Court and the House of Lords. Sept. 23, 1881.

The same is proved by the cases of Roxburgh, and the competition for the estates of the Duke of Douglas, all referred to in the pleadings of Mr. Corbet. The deed of nomination becomes a part of the entail applicable to it, and joins to the feudal conveyance therein contained. In this way it appears to me that Mr. Corbet is entitled to found on this separate deed 1742 as a nomination entitling him to succeed in preference to Sir Michael Shaw Stewart.

“ Sir Michael pleads that the right of succession conferred by
 “ the deed 1742 has been extinguished by the positive and ne-
 “ gative prescriptions. But when I consider that a destination in
 “ an entail hæredibus nominandis may be created by a separate
 “ deed nominating these heirs, I do not think there can be room
 “ for prescription till the succession shall open to these heirs.
 “ There can be no room for the positive prescription, because the
 “ destination ‘ to such heirs as the said Alexander Porterfield
 “ shall nominate and appoint ’ is uniformly repeated in every in-
 “ vestiture of the estate; and as Mr. Corbet claimed as soon as
 “ the succession opened to him, there can be as little room for the
 “ negative as the positive prescription; for it is well observed by
 “ Mr. Corbet’s counsel, that, when Sir Michael comes to prove
 “ his claim to the jury, he must show that all the substitutions in
 “ the tailzie have been evacuated prior to that which calls him-
 “ self; but when he comes to that one of hæredibus nominandis,
 “ he cannot show that no heir was named, because the contrary
 “ would be distinctly proved by Mr. Corbet. Now, had that
 “ substitution been left out of the investitures for the years of
 “ prescription, Sir Michael would not have had to encounter it;
 “ but being in every investiture, it meets him, and leaves it
 “ equally open now to apply the deed of nomination to the sub-
 “ stitution, and make it a part of the order of succession, as it
 “ would have been at Alexander Porterfield’s death if all the prior
 “ heirs had then been dead, and to prove by that deed that the
 “ heirs named prior to Sir Michael have not failed.

“ On these grounds it appears to me that Mr. Corbet is entitled
 “ to claim under the sixth substitution in the contract of mar-
 “ riage 1721, being that hæredibus nominandis, and to complete
 “ the substitution by uniting with the tailzie the nomination
 “ contained in the deed 1742, and therefore I am of opinion that

Sept. 23, 1831. “ he is the person who is entitled to be served heir of tailzie and
“ provision to William Porterfield in the lands of Overmains,
“ to Boyd Porterfield in those of Porterfield and Hapland, and
“ to the last Alexander Porterfield in the lands of Duchal.”

The cause having been put out for advising by the Second Division, Lord Glenlee, who had declined (his daughter being married to Sir Michael's brother), did not vote; Lord Cringletie retained his opinion; Lords Fullerton and Moncrieff, having been counsel in the cause, and having written the cases on which the judgment of the Court proceeded, did not return any opinion; and Lord Justice-Clerk and Lord Pitmilley expressed their entire concurrence in the opinion of the majority of the consulted Judges; and the Court thereon (13th Nov. 1829)* found, “ That
“ the respondent James Corbett Porterfield is the person entitled
“ to be served heir of tailzie and provision to the deceased
“ William Porterfield in the lands of Overmains, to the deceased
“ Boyd Porterfield in the superiorities of Porterfield and Hap-
“ land, and to the late Alexander Porterfield in the estate of
“ Duchal; therefore adhere to the interlocutor of the 15th of
“ May 1821 appealed from.”

Sir Michael Shaw Stewart appealed.

Lord Chancellor.—My Lords, this is a case of very considerable importance, whether we consider the large amount of property at stake, the principles of law involved in it, touching the construction of the instruments on which the parties rely for their title, or the length of time during which certain of the parties have been in possession. The case has been argued at great length, with a zeal which the importance of the question at issue might have been expected to excite, and with the ability and learning which your Lordships must have felt sure would be brought to the discussion, from the names of the learned counsel on either side. I had occasion, in the course of last sitting in this house upon the same subject, to fling out an observation during the arguments of learned counsel respecting the great weight as well as number of authorities on the bench of Scotland, whose decisions, when pronounced, had been supported after consideration by your Lordships; and undoubtedly, on a question which is not one of general law, but which regards the particular jurisprudence of that part of the United

* 8 Shaw and Dunlop, p. 17.

Sept. 23, 1831.

Kingdom and is confined to the law of real property—a question, strictly speaking, of Scotch conveyancing—it is natural for your Lordships to have a leaning,—and those who, in matters of law, are to advise your Lordships, (as all those who have preceded me have uniformly experienced,) feel that in executing this task in the face of such authorities as are sometimes to be reviewed, they have a leaning in favour of the judgments which have been pronounced by those Scotch Judges, whose learning and ability adorn the present bench. It would be very difficult indeed to conceive a case where all the Scotch Judges together had on a point of purely Scotch law concurred, in which your Lordships would feel yourselves justified in reversing the decision; nevertheless, even in such a unanimity, examples are not wanting of reversals (or at least of remittals almost amounting to reversals), the house differing in opinion with the unanimous or almost unanimous opinion of the Court below. In some of those cases (and they are remote in point of date) there were good reasons for supposing, that although great learning had been brought to the decision of the Court, and in many instances very great ability and acuteness, yet that perhaps an entire want of bias on the part of those very learned and acute persons, sometimes possibly of a national kind, was not wholly wanting, but had cast, as it were, its shadow across what ought to be unclouded clearness of the judicial path. But ever since I have attended to these matters my observation has led me to few, if any instances, where so great a union of opinion as exists in the present case has been set at nought by a contrary decision on a question regarding the law of real property in Scotland. There is no case in which such weight of authority has been held so light in the scale as to be counterbalanced by your Lordships' opposing opinion, or has been set at nought by a reversal of a judgment so supported. Nevertheless I am far from saying that the case may not arise where, for instance, all the Judges save three having a clear opinion, or where all the Judges, the most eminent for their sagacity, for their learning, and for their experience as lawyers conversant with the Scotch law of real property, might not be on one side, your Lordships may yet take part with a very small portion in point of numbers and even in point of weight, in the Court below. If such a case should arise it is your Lordships' bounden duty to meet it, and to follow your own opinion because it is your opinion, and not to bend to the authority of the Court below; for else, if there were a Court composed of a much smaller number of Judges, where absolute unanimity might be much more frequently expected, a contrary supposition would amount to an ouster of the appellate jurisdiction. I only throw out these general observations for the pur-

Sept. 29, 1831.

pose of introducing one or two remarks, with which I am about to conclude. The notice, as it were, which I at present offer to your Lordships, is, that undoubtedly, if I were upon my present knowledge of the case, and after the attention I have been able to bestow on the arguments at the bar, and also on the very voluminous and elaborate papers in which those arguments have been submitted to your Lordships, I should have no hesitation in affirming the judgment. Nevertheless, my Lords, I deem it my duty to go through these once more; I deem it to be my duty specially to direct my attention to several of the topics which are to be found in an able and judicious opinion of Lord Mackenzie, one of the smaller number of Judges who had disposed of this case in Scotland, particularly one branch of the argument, which I have not seen answered on the face of this case. That (and one or two other points made by that able and acute Judge, whose arguments on all occasions are deserving of minute attention,) will occupy my attention. One word as to appeals. My Lords, it is in vain to say—while there may be points of law which may be of some difficulty, as well as of importance to the interests of the parties—that any general rule can be laid down with respect to the discretion which should be exercised in appealing from the Courts below. One should say, generally speaking, that on a question of purely Scotch law, as this Court is constituted without the assistance of Scotch Judges—as it is a foreign Court of Justice sitting to decide on foreign law, in the practice of which none of your Lordships are educated, but only take it up as it is presented to you at the bar of this house,—a leaning to a decision on a question of purely Scotch law, where such a preponderance of opinion and authority is to be found on one side, might be expected; nevertheless the number of appeals would rather lead to a doubt of that position. But, again, I have to say, generally speaking, if I were a professional man in that part of the kingdom, I should not be very ready to persuade parties, where there was so great and preponderating a balance of opinion in favour of one party, on a question of purely Scotch law, to seek the chance of a reversal. As to the present case, it is my bounden duty to go through it with the balance as perfectly equal as if I did not know that the Judges had been so divided. I shall lay that out of view, and betake myself to the anxious consideration of the opinion of Lord Mackenzie, and doubtless I shall find some answer to the difficulties he raises; if not, my opinion, such as it is, must alter. In the meantime I move that your Lordships' judgment be postponed.

On a subsequent day.

Lord Chancellor—My Lords, in this case I had some doubt upon one point, in consequence of the learned and ingenious opinion of

Lord Mackenzie. There appeared to me a topic raised, if not an important argument in the cause, that had not been sufficiently dealt with in the Court below, as far as I was favoured with the opinions of the Judges who decided the cause, and I postponed advising your Lordships to affirm till I examined the reasons given to support that view of Lord Mackenzie's. I will not say that the result of my reading upon the point, and looking into the authorities upon it, has entirely removed the difficulty from the way, or taken the doubt out of my mind which the views of Lord Mackenzie were calculated to raise. Nevertheless, though he certainly still may be said to have raised a difficulty, it is not so insuperable as to overbalance the authorities which I find on the other side, and although this is a question of strict Scotch law conveyance, and upon a question touching the rights of real property, if I found that their Lordships had taken a view that was contrary to the best opinion I could form upon balancing their own reasons, and upon examining the authorities upon which they assumed to be bottomed, I should, as I stated before, have had no hesitation conscientiously to give that difference of opinion in favour of the party entitled to the benefit of it, and have advised your Lordships to reverse the judgment below ; yet as I do not see that the difficulty is insuperable, I shall humbly advise your Lordships to affirm the interlocutor appealed against.

Sept. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL — MONCRIEFF, WEBSTER, and
THOMSON, Solicitors.

JANET and ELIZABETH KIBBLES, Appellants.—*Mr. Murray—* No. 42.
Dr. Lushington.

JOHN STEVENSON and others, Respondents.

Sasine.—*Writ.* 1. Found (affirming the judgment of the Court of Session), that a precept of seisin is not exhausted by an unrecorded infeftment. 2. What discrepancy between the signature of a witness to a marriage contract and the name in the testing clause held not to invalidate the contract, or, on that ground, to render null an infeftment taken upon the contract.

JAMES STEVENSON married Marion Spreull, the eldest of three sisters, heirs portioners and infeft in the lands of Braehead

Sept. 23, 1831.

1st DIVISION.
I.d. Mackenzie.

Sept. 23, 1831.

of Thornly. By her he acquired one third of these lands, and the other two thirds he acquired by dispositions from the co-heiresses, with consent of their respective husbands, on which he was infest, his wife remaining infest in her own portion. His son, James Stevenson, married Janet Johnstone; on which occasion James Stevenson senior, with his wife Marion Spreull, became parties to the contract of marriage, inter alia, disposing, assigning, and conveying "to and in favour of the said James Stevenson junior, and the children to be procreated of the said marriage, whom failing, his nearest heirs and assignees whomsoever, all and whole the thirteen shilling and four-penny land of Braehead," &c.; and in consideration of 200*l*. sterling, or such other sum as Janet Johnstone might bring from her father's succession as tocher, during her marriage, James Stevenson the son became bound to pay her an annuity of 15*l*. sterling from the rents of Braehead. The deed farther contained an obligation on James Stevenson the father and Marion Spreull to infest James Stevenson the son in fee, and his spouse Janet Johnstone in life-rent, and in security of their respective provisions, with procuratory of resignation and precept of sasine.

The testing clause bears the contract to have been subscribed by Janet Johnstone and Alexander Speir, one of her trustees, before James Stevenson in Corseford and James Stevenson in , but the subscription is "James Stven."

Sasine was taken on the contract in favour of James Stevenson and Janet Johnstone, but it was not recorded in terms of law. A second infestment was taken (25 Dec. 1793) on the same precept in favour of James Stevenson and the children of the marriage in fee, and Janet Johnstone in life-rent security of her annuity, and the sasine was (22d Feb. 1794) duly recorded.

The issue of the marriage were James Stevenson the eldest son, Janet Stevenson the wife of Robert M'Nair, and John and Robert Stevenson.

James Stevenson (the eldest son) on attaining majority in 1817, disregarding the contract of marriage, entered into possession, and expedite a service as heir in special to his grandfather and grandmother, obtained a precept of Clare constat from the superior, and took infestment; he also expedite a general service as heir to his father, proceeded to make up titles, passing by his father, as if he had died in a state of apparency. He contracted

large debts, for which, with advice and consent of his mother, he granted heritable securities for 3,350*l.* sterling. These, by original contraction or by assignation, came into the possession of Janet and Elizabeth Kibbles. Sept. 23, 1831.

Having become still more embarrassed in his circumstances, the Kibbles contemplated availing themselves of the powers of sale contained in their securities; but the debtor's brothers and sisters made up titles under the contract of marriage, 10th Aug. 1793, which they insisted excluded the titles made up by James Stevenson the eldest son, and consequently the heritable securities granted by him. The Kibbles thereupon raised an action of reduction of the marriage-contract, and maintained, in point of law,—1. That the marriage contract was null and void, in respect that one of the witnesses is not designed at all, the designation being left blank, and the subscription being apparently by a person of a different name. Of consequence no sasine could validly be taken upon the deed. 2. And that the sasine alleged to have been taken in August 1793, not being duly recorded, can have no effect in competition with third parties, and it was incompetent to take a subsequent sasine upon the same precept; and consequently the sasine said to have been taken on the 25th December 1793, and to have been recorded on the 22d of February following, was null and void.

On the other hand the Stevensons contended,—1. That James Stevenson tertius, who was son of the marriage, and served heir to his father, having no right to make up titles in disregard of the marriage-contract, and not being entitled to pursue a reduction of that contract, the pursuers, who derived right solely from James Stevenson tertius, were in like manner barred from pursuing a reduction of the contract. 2. That they were further barred from pursuing a reduction by their homologation and acknowledgment of the contract, appearing from their having taken their bonds from Janet Johnstone, who had no right whatever except under the contract and her husband's infestment thereon. 3. That the pursuers, being in the knowledge of the contract, and being certiorated by the record that infestment had been taken thereon, and this infestment showing the right the defenders had to the lands, were not in bonâ fide to take securities from James Stevenson, in defraud and prejudice of the defenders' rights. 4. That the incompleteness of the testing clause of the

Sept. 23, 1831.

contract, in so far as regards the subscription of Janet Johnstone cannot at all affect the validity of the disposition by James Stevenson senior and Marion Spreull, contained in that contract. Even as to Janet Johnstone's subscription, the competency of objecting to the imperfection of the testing clause was removed by the rei interventus of the marriage. And 5. that the objection to the validity of the sasine taken in December 1793 was not well founded in law, there being no incompetency in taking a second infeftment where the first has not been recorded, particularly if it be defective in the solemnities required by law, and altogether void and null, as is the case with the unrecorded sasine.

The Lord Ordinary sustained the defences, assoilzied the defenders, and decerned, with expenses, adding in a note, that " he does not rest upon the objections to the pursuers' title ; he " decides the case upon the merits, but thinks it best to leave " the whole cause together."

The Kibbles reclaimed to the Second Division of the Court, but their Lordships, May 25, 1830, " adhered to the interlocutor " submitted to review so far as it sustains the defences against the " plea of the pursuers, founded on the objection to the testing " clause in the contract of marriage, and to this extent refuse " the desire of the reclaiming note, and decern. But as to the " second objection against the validity of the infeftment produced by the defenders, upon the ground that the precept upon which it proceeded had been exhausted by a prior sasine, and in " order that this point may be finally settled, appoint the record " and cases for the parties to be laid before the Lords Ordinary " and the Lords of the First Division of the Court for their " opinion."

The opinions * of the Lords of the First Division and of the Lords Ordinary having been returned, and a majority of their

* *Lords President, Gillies, Meadowbank, Mackenzie, Corehouse, Newton, Fullerton, and Moncreiff.*—The question on which our opinion is asked is certainly one of considerable nicety, and various difficulties and anomalies occur in whichever view it is considered. But, on the whole, we are of opinion that the precept of sasine was not exhausted by the unrecorded sasine, and that it was competent to execute that precept of new by taking and duly recording a second sasine. The difficulty arises from the peculiar terms in which the act 1617 is worded, as it does not, in a single word, declare that a sasine not duly recorded " shall be null," but that the same shall " make no faith in judgment, by way of action or exception, in prejudice of a third

Lordships having concurred in opinion with Lord Mackenzie, Sept. 23, 1831.
the Second Division, December 18, 1830, adhered to the interlocutor complained of.

“ party who hath acquired a perfect and lawful right to the said lands and heritages ;
“ but prejudice always to them to use the said writs against the maker thereof, his
“ heirs and successors.” But we are of opinion, that, in fair construction, this does
amount to a declaration of nullity. The exception as to the maker, and his heirs and
successors, appears to be mere surplusage, for a charter or disposition would be good
against the granter and his heirs, even though it did not contain a precept of sasine ;
or, perhaps, this exception was added ob majorem cautelam, lest it should be sup-
posed that without it a man might object to a deed granted by himself ; and we
cannot possibly suppose that it could be the intention of the legislature to make a
distinction in this respect (when none exists in reason and expediency) between
sasines and resignations ad remanentiam. We are the more inclined to this opinion
because all the difficulties of the case were fully considered by both Divisions of the
Court in the cases, 16th June 1814, Kibble v. Sir John Shaw Stewart, in the Second
Division, and that of 2d December 1818, Baxter v. Watson, in the First Division ;
and to the same effect there is the case, in 1818, of Dr. Keltie, decided by the
Second Division, and that, too, in a competition with creditors. Therefore, on the
whole, as we think that the act 1617 is capable of this construction, and as this inter-
pretation of it is certainly the most expedient and analogous to the undoubted law in
the case of resignations ad remanentiam, we are of opinion that the second sasine in
this case is not null by reason of the precept having been exhausted by a prior sasine
not duly recorded.

Lord Medwyn.—After the opinions which have been given, it is with great diffi-
dence that I express the doubts which I still entertain. But when I contrast the
terms used in the act 1617, c. 16, with those in prior and subsequent statutes, which,
in brief and apt terms, declare a nullity ; and, further, when I consider the interpreta-
tion put upon them by the judges who were contemporary with the enactment, I
have great difficulty in holding that an unregistered sasine is null to all intents, and
that a proprietor in that situation has nothing more than a mere personal right like a
disponee uninfest. Thus, by 1555, c. 29, it is declared, that a writing or instrument,
bearing or containing a reversion, “ sall mak na faith bot gif it be insert” in the re-
gister ; and, by 1599, (vol. iv. p. 184, new ed.), sasines, &c. are to be registered
within forty days of their dates, “ otherwise to be null, and to mak na faith in judg-
“ ment nor outwith, and the said nullity to be resavid be way of exception ;” and after
appointing local registers the act concludes, “ and that nane of the saids evidents be of
“ force, strength, or effect to ony intention, bot to be null and of nane avail, except the
“ same be registrat as said is.” Between these statutes, which import absolute
nullity, and the act 1617, c. 16, there is the most marked distinction, implying, as it
would seem, an intention not to make non-registration an absolute nullity, but only
that, as a latent right, it should not stand in the way of a competitor claiming by a
sasine duly recorded ; for it provides that, if the writs shall not be registered within
sixty days, they are “ to make no faith in judgment by way of action or exception.”
If the clause had stopped here, the nullity would have been absolute against all, except,
of course, the granter and his heir, who could not refuse to fulfil an agreement lawfully
entered into, whether infestment had followed on it or not ; and here I think it would
have stopped, or would have adopted the phrasology already known and recognised in

Sept. 23, 1831.

The Kibbles appealed. Their legal arguments, as well as those maintained by the respondents, were founded on the pleas

the strong and unambiguous language of the act 1599, or the more abbreviated form of 1555, if absolute nullity had been intended; but, instead of doing so, it proceeds to define and limit those against whom an unregistered sasine is to bear no faith, viz. "in prejudice of a third party who hath acquired a perfect and lawful right to the said lands and heritages, but prejudice always to him to use the saids writs against the partie maker thereof, his heirs and successors." It has been said that the terms used import merely that an unregistered sasine is null, but that there is a personal exception against the granter or his heir pleading the nullity. But I do not think that this is the correct interpretation of the statute, for, in construing a statute, I understand these rules of interpretation should be observed; 1st, As far as possible to give effect to every material word of the statute; 2d, That where, in the same enactment, or in enactments on the same subject, a variation in the phraseology occurs, attention should be paid to this variation; and, 3dly, That the contemporaneous interpretation of lawyers and judges should be adopted, rather than any more recent, as most likely to discover its genuine meaning. Now, it seems not disputable that the judges who probably framed the act 1617 did not interpret it so as absolutely to nullify an unregistered sasine, but to a certain extent gave effect to it, even when not used against the granter or his heirs. On 25th March 1623 Durie reports this case: "In an action pursued by the Laird of Dunipace contra his tenants, wherein the pursuer's sasine being quarrelled for not being registered in the clerk register's books within the space of sixty days after the date thereof, the Lords repelled that allegiance, because they found no person had interest to propone that nullity, but a third person who had a lawful right to the lands standing in his person, as the words of that act itself purport, viz. the act of parliament 1617."—Mor. p. 13538. And again, 24th March 1626, "A purchaser, though his sasine was not registered, was found preferable to the seller's creditor arresting the rents in the tenant's hands, for the same was a real right with regard to the seller and his creditor, and consequently against the tenants, who did pretend no right to the property."—Mor. p. 13540. It may be remarked, in passing, that Lord Haddington, who became President of this Court in 1616, did not resign that situation till February 1626. He was also Secretary of State, and no doubt was the author of the improvement upon the secretary's register introduced by the act 1617, as he is known to have been of the acts passed in Parliament 1621. He was also the first keeper of the new register, and cannot be supposed ignorant of the meaning of the act, or to have put a wrong interpretation upon it; yet, in the first of the above cases, decided, when he presided in the Court, the person entitled to object want of registration is clearly defined in terms of the act, not that the sasine is null; and by the second the same is held good, not because of the personal objection against the seller, or those in his right pleading it, but it is distinctly held to be a real though qualified right. In like manner, in Lord Cranstoun v. Scott, 18th February 1631, an allegiance was repelled, "because a sasine not registered makes a real right, though it will not give preference in a competition."—Mor. p. 13545. In Rowan v. Colville, 21st July 1631, to an unregistered sasine of a mill, with the multures of the defender's lands, the defender could not object nullity, as he had no right to the mill.—Mor. p. 13546. At a later period the same view was taken, and a superior's sasine, though not registered, was found a good title in a declarator of non-entry against the

in law relied on in the Court of Session, and these were re-
spectively supported by the authorities mentioned below. Sept. 23, 1891.

vassal, "who did pretend no right to the superiority."—June 12, 1673, *Faa v. Lord Powrie*, p. 13551. Again, it was found that "a sasine unregistered was not absolutely null, but may be an active title in an improbation of other rights on that land."—November 14, 1678, *Dalmahoy v. Ainslie*, p. 5170. Thus, for more than half a century after the passing of the act 1617, the interpretation put upon it was uniform, and not importing a total nullity, as is prescribed by the act 1599; and as the object or motive of these two acts, as indicated in their preamble, was different, this may account for their different effects. The act 1599 was to prevent injury by the forging of private writs, "the same being kept obscure, quile the moyane of the tryale of the falsset of thame be taken away;" hence they were to be registered within forty days, otherwise to be null, as if they had been forged. The act 1617, again, was to prevent an evil of a different kind, the mischief arising from double alienations "by the fraudulent dealings of parties, who, having analized their lands by their unjust concealing of some private right made by them, render the subsequent alienation done for great sums of money altogether unprofitable." Hence it was provided that the specified writs should be made public by registration, and if they remain private, in consequence of not being registered, they are not to bear faith against the party to whom the lands are analized, "having acquired a perfect and lawful right to the lands." To remedy the evil to be provided against it was not necessary to go farther, and accordingly the enacting words appear expressly limited to the object in view, and the interpretation put upon the act during a century at least did not extend its meaning. The authority of Stair is referred to as importing the absolute nullity of a sasine unregistered, where he says, "they are null." Considering the numerous cases in his own time where effect was given to such a sasine when not used in competition for the lands, it would have been singular if he had so laid down the law; but he clearly means null, in terms of the statute, against third parties; for, in treating, in a previous page, directly of the subject of sasines, he mentions the necessity of registration as required by 1617, c. 16, and recites the precise terms of the act and it is only when he comes to discuss the question, what would be the effect if a sasine were given in to be recorded, and the keeper were to mark the same registrate, but yet not insert it in the register, that he uses the above terms, importing no more than the nullity, so far as it goes, by the act; and accordingly when, at a subsequent part of his work, he treats of competition, he says, "Sasines, inhibitions, and interdictions are ordained to be registrate, as before expressed, or otherwise they are null as to any who have a complete right, who thereby are preferable." Again, instruments of resignation *ad remanentiam* were, by 1669, c. 3, to be registered within sixty days, "otherwise the said resignations to be null." It has been said that there was no reason for making any difference between the consequence of not registering this instrument and the writs mentioned in 1617, and therefore as this was declared null, so it must be understood that the others were held to be so too. But, as the resignation could not be quarrelled by the granter or his heirs, if creditors and singular successors were guarded against their ignorance of this transfer of the property to the superior, there was no other party against whom the superior, having the radical right in him, required to use such a title, and therefore the qualification of nullity only against third parties having lawful rights in the lands was not necessary to give the full benefit of the act of resignation to the

Sept. 23, 1891.

Lord Chancellor.—My Lords, in this case I pass over the defective execution of the contract of marriage by the bride, for the husband

superior, without injury to the singular successor of the resigner. But whether we can now discover a sufficient reason for the difference of expression, the difference is obvious; and it must be recollected, that at this very time the Court was giving effect to a sasine unregistrate, and not holding it an absolute nullity. If the object of 1669 had been precisely the same as that of the act 1617, and if the simple declaration that it was null was equivalent to that enactment, it is singular that, in subsequently providing for the registration of burgage writs, the same expression was not adopted; but, on the contrary, there is an anxious repetition in 1681, c. 11, of the nullifying clause in 1617, declaring the same “to make no faith in judgment be way of action or exception, in prejudice of a third partie, who hath acquired a perfect and lawful right to the said tenements, but prejudice always to them to use the said writs against the parties makers thereof, their heirs and successors.” There are statutes besides those already noticed in which nullity, without any exception, is prescribed for want of registration. Thus, as to letters of horning and relaxation, and inhibition and interdiction, by 1579, c. 75, and 1597, c. 268; and I cannot conceive why this simple expression should have been abandoned, if an absolute nullity was meant to be the effect of non-registration of sasines. Therefore, looking to the very precise and guarded expressions of the acts 1617 and 1681, I have great hesitation in giving them such an interpretation as to infer absolute nullity, instead of holding that one possessing under such a title is a feudal proprietor, all whose acts and deeds will be effectual as such, except against those who have obtained a complete competing title to the lands on the faith of the records showing no other sasine over them. Why should not an unrecorded sasine be good (as has been found) in favour of a purchaser against tenants, for removing them, or for pursuing them for rents, or a good title for multures, and even for reduction-improbation of other rights over the lands? A superior, on such a title, has pursued a decree of non-entry; and to these, let it be remembered, there are no contrary decisions. Such a title has never been found ineffectual for those purposes. I should also think, that if a party has granted double conveyances, and sasine has been taken by both disponees, but the last disponee is first infeft, neither sasine being recorded, in a competition between the two the infeftments would be good, and the first would be preferred; the act 1693, c. 13, only supplying an omission in the act 1617, and regulating the preference of those which are recorded. If a purchaser neglect to record his sasine, would a creditor of the seller, arresting the tenants’ rents, be preferable, having merely a personal right? If a proprietor, possessing upon an unrecorded sasine, give an heritable bond to a creditor, or a locality to his wife, would these not be effectual against his personal creditors, and preferable to them? and would not the widow be entitled to a terce in virtue of an unrecorded sasine against the personal creditors of the deceased husband? And I conceive, that although a disposition by the husband, or an heritable bond, without infeftment, would not hurt the terce, yet that, if infeftment followed, although not recorded, they would exclude the terce, and be good in favour of the grantee; and when the doctrine of recognition was a part of our law, I cannot conceive that, in the case of alienation by the vassal to a stranger, it would have been a good defence against an action of recognition that the disponee was only possessing on a sasine unrecorded, which certainly was good against the granter, and effectually alienated the fee from him, although the casualty would not be incurred if the

executes it, the two disponees execute it, and it is only to the attestation of the bride's execution that there is an objection; but that leaves no doubt in my mind, for the bride performed her part by marrying her husband; and I agree, therefore, with the learned Judges in the Court below, that the contract is complete and valid. The material question is one of feudal law, whether the precept of sasine contained in this contract has been exhausted by an unrecorded

Sept. 23, 1891.

disposition was not completed by sasine, or the sasine was null. Further, I would hesitate to hold that an adjudication without infeftment would be a sufficient title to insist in a reduction of a right founded on a disposition or heritable bond upon which sasine has followed, though unrecorded,—see *Dundas against Wallace*, 10th November, 1683, p. 13283; or that a general service would be sufficient to carry right to a disposition on which infeftment has been taken, and where the only objection is, that it has not been duly recorded, as if it had been merely a disposition without infeftment, or with infeftment on a precept a me, unconfirmed by the superior.—See *Douglas against Somervell*, 10th July 1713. In short, I must still hesitate about holding that one who is possessing upon a sasine, valid in all respects except that it has not been recorded, has nothing but a mere personal right in the lands, as if his title were a simple disposition; and although I am aware that the opinions indicated in two recent cases tend that way, till the matter is settled by a decision directly in point, I incline to hold by the doctrine so expressly laid down by *Erskine*, B. 2, t. 3, sect. 40.

Lord Balgray.—I concur in the opinion of Lord Medwyn, as it appears to me to lay down the principles of our law as applicable to the present question, and as derived from our practice, and supported by our best authorities. It is vain to dispute or deny, even at this moment, but that an unregistered sasine must be sustained and must be held as creating more than a mere personal right, when directed against certain persons. This being the case, it is quite contrary to every feudal principle to hold, that the delivery of an heritable subject, viz. the sasine, can be partly given and partly not given. The mandate is given, and the public officer who executes it cannot qualify his own act. The difficulty which has occurred can be very easily remedied by a most obvious and simple legislative interposition. It is not surprising that a diversity of opinion should arise upon the present question, particularly when it may be affirmed, that, ever since the case of *Kibble v. Stewart*, in 1814, the undoubted understanding of practitioners has been to hold an unrecorded sasine as null, and so to take a new infeftment upon the original precept. Property to a great amount is held at this moment on the faith of that judgment and a subsequent one. This case stands in a most unfortunate predicament. The strict and correct principles of law stand in one way, and the expediency and propriety of a court of justice adhering to their judgments, particularly in matters of form, stand directly opposed on the other.

Lord Craigie.—It seems of importance in this case to consider the effect of a second instrument of sasine, taken upon the same precept with the first, and liable to challenge on other grounds than those introduced by the statute 1617. It is to be observed, that a precept of sasine generally is of the nature of a mandate, and “cannot reach to what has been already done.”—See *Stair*. But, along with the instrument of sasine which follows, it is also of the nature of an *actus legitimus*,

Sept. 23, 1831.

sasine, and consequently whether the exhaustion of that precept shall operate to the defeasance of a subsequent sasine. Now, upon this question there appears to have existed considerable doubt at one time, and in consequence of that doubt it is that this case was sent for the opinion of the other judges. Eight of the judges have given an unanimous opinion in favour of the judgment, proceeding upon the principle, that an unrecorded sasine did not exhaust the precept, that the unrecorded sasine was null and void to the intent in question, and was indeed to be passed by as an absolute nullity, and that the precept might be validly executed by a subsequent sasine. Now, in opposition to the opinion of these eight judges, there is first the opinion of Lord Medwyn, who says not one word upon the recent cases, though he says a good deal upon the old cases, no one of which is on all-fours with the present. There is also Lord Balgray, whose doubt it was that gave rise to the

which cannot be performed in parts or at different times, but at once and without repetition. Where different estates or parcels of land are conveyed in one deed, with a precept of sasine properly adapted to the circumstances of the case, the result is the same as if there were so many different conveyances and precepts, and of course an error or defect, as to one of the estates or parcels of land, cannot affect the validity of the conveyance as to the rest; but where the conveyance or precept of sasine specifies one estate, or one of several parcels of land, by a particular name or description, and infeftment follows in the same lands, or in one of the different parcels of land, under a different name and description, it will not be permitted, in a separate and subsequent infeftment, taken on the same precept, to correct the blunder. In the same matter, if the instrument of sasine is lost or cancelled by the party having right to it, it must be incompetent, in virtue of the same precept, to give a new infeftment; and so, if the instrument of sasine omits material words, or if the notary's docquet has been abridged or altered in the record, the result, it is humbly thought, must be the same. In the case which has been referred to, of Grey against Hope, in 1790, where certain lands contained in the conveyance and infeftment had been omitted in the record, it was unanimously held, although the question occurred in a court of freeholders, that the feudal title was inept; and it surely will not be said that a new infeftment could have been taken, or was attempted, for establishing the right. From all this it seems to follow, that if an instrument of sasine, at one time valid according to the authorities that have been quoted, shall become in part, or to a certain extent, ineffectual in a question with certain individuals, although not as to others, (which is truly the case with an infeftment not duly recorded,) such infeftments cannot be cured by making out another instrument on the same precept; either a new precept must be obtained, or, if that cannot be done, there must be an adjudication in implement of the conveyance, in the same manner as if there had been no precept in the deed. And holding, as it is indicated by the interlocutor of the Second Division (21st May 1830), that the point is yet unsettled, it cannot be thought expedient or just, in virtue of the determinations referred to, to subvert the general law. This could only lead to farther and more dangerous relaxations in the established forms, while, by multiplying infeftments on the same warrant at different times, great confusion would arise in the titles of landed property in Scotland.

Sept. 23, 1881.

hearing in presence in the case of Baxter, and he refers to Kibble v. Stewart in 1814. Lord Medwyn neither refers to that nor to Baxter's case (or at least so generally as to be no reference at all), nor to another case of which we have no account—I mean that of Keltie. But the weight I should otherwise give to the opinion of Lord Medwyn is very greatly impaired by the remarkable fact of his not taking any notice of what appears to have staggered Lord Balgray himself, albeit Lord Balgray, generally speaking, concurs with him. It seems singular enough that the old cases which do not bear upon the point half so much as Kibble v. Stewart have been much commented upon, and that Kibble v. Stewart, which is, as far as the opinions of the judges go, a direct authority in the present case, is in a manner passed over; but I should wish to know whether, upon a question of pure Scotch law,—a practical question of conveyancing, upon which it is of the utmost importance that the rule laid down by decided cases, and followed since those judgments were known, and upon which a vast amount of property is held at this moment,—it would be a judicious thing for your Lordships to unsettle that rule upon the subtlety of the argument contained in some parts of these papers and the authority of Lord Medwyn, who gives these decisions the mere passing observation of being “two recent cases” indicating opinions adverse to his, and who takes no notice of the still more important fact of their forming the rule to practical men by which conveyancing has been carried on for the last seventeen years? My Lords, when you look at the authority of Lord Balgray on the other hand, he agrees with his learned brother generally; but he says, that ever since the case of Kibble v. Stewart “the undoubted understanding of practitioners has been to hold an unrecorded sasine as null, and so to take new infeftment upon the original precept”—that is to say, that the original precept was not exhausted; if it had been exhausted upon the first sasine, a new infeftment could not validly have been taken; and he adds, “Pro-perty to a great amount is held at this moment on the faith of that judgment and a subsequent one:” meaning the case of Baxter. Lord Balgray was the only judge who differed with his learned brothers in Baxter's case, they holding that a precept was not exhausted by an unrecorded sasine. That judge raised the only doubt upon the subject, and in consequence of his Lordship's doubt a hearing in presence was ordered, but the parties chose to have the case settled out of Court. No doubt, we are told that the opinion of a most learned counsel, the dean of faculty (Ross), was in favour of the precept being exhausted; but if his opinion had been of any great weight, as set against the decision of the judges in Kibble and in Baxter, we have the explanation of a learned judge who referred

Sept. 23, 1831.

to that opinion, and says, that it rather proceeds on the special consideration, that the title there was so doubtful that a purchaser could not be compelled to accept of it. Dr. Keltie's case has also been referred to, but we are not informed of its circumstances. Such is the predicament in which the present question stands.

Now, this gives rise to the natural question, whether the law was altogether changed by Kibble v. Stewart, followed by Baxter v. Watson, or whether it did more than declare, for the first time, that which had before been the law?—and I take upon me to say, on the showing of Lord Medwyn himself, though some of the cases he quotes support his general doctrine, that none of them comes up to his position; namely that they are contrary either to the decision in Kibble v. Stewart or to the decision in Baxter v. Watson, or negative the decision pronounced by so great a majority of the judges in the present case; not one of those former cases could be cited as upon all-fours with those two, or with the present. Well, then, I look to Kibble v. Stewart, and to the very learned authority of the late Lord Meadowbank, and the most acute argument he holds upon that case, which is delivered with the greatest precision, and with the most unhesitating confidence. This is of the more importance, because, although a great feudal lawyer, with all the qualities a judge should have, he was very prone to question and to doubt. They were all learned doubts, and deserving of attention, but still this was the temper of his mind; nevertheless he lays it down with the greatest decision, that an unregistered sasine is null and void; but he adds the very important observation, that there may be parties who cannot set up the nullity; for instance, the granter and his heirs, tenants and others claiming through him; and this shows the little value of some of the cases quoted, because what signifies it to show, that in an action of removing brought by a landlord against a tenant, fraudulently or otherwise misconducting himself, the tenant was not allowed to set up the nullity? But does it follow that the nullity in the title does not exist—that the title may not be absolutely annulled, though the tenant may be estopped by this tenure to dispute his lord's title? I take that to be the rule of law in Scotland, that the tenant cannot set up an objection to the landlord's title; the landlord may remove him, and the tenant is the last person who can say that the landlord's sasine is a nullity in itself. Therefore, all the cases going upon estoppels, by which certain persons are barred from setting up a certain objection to the title of another, are, in my mind, of extremely little avail in the present argument. There is no doubt as to the statute which mentions resignations and the statute which deals with sasines; the one uses the expression of “no effect,” and

Sept. 23, 1831.

the other says, "make no faith in judgment." But upon looking into the text books referred to on the other side—Erskine for instance, (and I have the greatest deference for his works, particularly his first work, which had his own revision when it passed through the press,) I think it is not difficult to show that the doctrine contended for is somewhat repugnant to the doctrine as it is there stated, and to Lord Bankton's a little more so. But it is said that Professor Bell, in his valuable Commentaries, gives token of his opinion being the other way: yet it is fit to observe, that under the very head of exhausting the precept of sasine, (I do not cite him as any authority, for a living author cannot be cited in a court of justice, but as evidence of the understanding and practice of conveyancers, and so far affording a strong reason for standing by the later current of decisions, between which and the former decisions I can see nothing like a direct contradiction,) he says, "There is no case which in all respects can be considered a precedent to settle this important point; but the weight of authority and of judicial opinion seem to authorize the conclusion, that the precept in such a case is unexhausted;" and he cites Baxter and Kibble, the opinion of Lord Meadowbank, and a manuscript collection of Lord Pitfour's opinions. Now, if all that is to be said in derogation of Professor Bell, as bearing witness to the sense of conveyancers upon the subject, is, that till the case of Kibble v. Stewart he held the rule to be one way, and now holds it to be another way, this, instead of operating against him, is an argument to show his sound sense, for what can be more rational than taking a new view, if the thing has become new? Nevertheless I see no ground for holding any novelty to have been introduced. The case of Kibble was only collecting what had been floating in opinion, affixing a judicial character to what had not before obtained it; but even if it had been an overturning of old decisions, can any thing be more judicious than for the learned professor to lay it down that he can no longer teach his pupils and the world that the law was so, or that the practice of conveyancers ought to be so; but that, since those decisions, the weight of judicial authority and the weight of learned opinions are decidedly the other way? I hope we shall not have this question mooted again, because some learned judge doubts and says, "Let us have it heard," or because some barrister doubts, and dies before he makes his award. I have mentioned what detracts from the value of Lord Medwyn's opinion. He has taken an unilateral view of the decisions, totally neglecting the cases which did bear upon the point, and relying upon those which did not; that takes away very much from the weight of his authority, and shows that it is a theoretically biassed opinion upon the subject. As to Lord Craigie,

Sept. 23, 1831. he is not open to that observation, but he does not venture on so strong an opinion, and Lord Balgray in effect coincides with the majority of his brethren; for whatever his vote may have been, what stronger reason could he give for adhering to the course of decisions, which for seventeen years have been regarded as making the law, than that a great amount of property is held by no other law, and by titles invalid if those decisions are wrong? In conclusion, I earnestly hope that this case may, upon the weight of its own authority, (not merely upon the weight of your Lordships' sanction of that authority,) be held to fix the law upon this important subject; and though it may have been as well that this should be appealed here, I cannot help thinking that, to bring up such a case—nearly an unanimous decision, founded on previous decisions and the practice of conveyancers, with no direct decision the other way—was resorting to your Lordships with a question which it could not be expected your Lordships would reverse, and which it was infinitely more probable you should affirm. Nevertheless the case has come here, and it is necessary you should deal with it; but I should hold that I had not well discharged my duty to your Lordships if I had cast a doubt upon the question by going so far as hearing the respondents' counsel, thus throwing parties into a state of anxiety whose titles have been founded for the last seventeen years to so large an amount, as Lord Balgray says, upon the cases cited. No encouragement or tolerance will be given to any persons who, with any theory upon this subject, shall seek to upset those titles; and any one seeking to upset them in a court of justice, who shall find judges still doubting on the law, will, if they come to your Lordships' House, receive very little countenance to their endeavours. I therefore move your Lordships to affirm the interlocutor complained of.

The House of Lords ordered and adjudged, That the interlocutor complained of be and hereby is affirmed.

Appellants' Authorities.—Creditors of Dick, 20th July 1744 (5721); Bell, 5th Dec. 1707 (16,888); Graham, 26th Dec. 1752 (M. 19,902); Russel, 17th Dec. 1766 (16,904); Archibald, 17th Dec. 1787 (M. 16,907); Douglas, Heron, and Company, 28th Nov. 1787 (M. 16,907); Abercrombie, 15th July 1787 (M. 17,023); Lockhart, 16th Feb. 1815 (F. C.); 1 Bell, 579, 696; stat. 1817, c. 16; Keith, 17th Dec. 1703 (—); Gray, 24th March 1626 (M. 505); Rowan, 21st June 1638 (M. 13,546); Lord Cranstoun, 18th Feb. 1631 (M. 13,545); Faa, 12th June 1678 (M. 9307); Dalmahoy, 14th Nov. 1678 (M. 5170); Lord Dunipace, 25th March 1623 (—); Marshall, 13th Nov. 1623 (M. 6840); Simpson, 28th June 1678 (M. 13,555); 1 Bell, 579, 696; Duke of Montrose, Feb. 1728 (—); 3 Ersk. 3, 49; 2 Mackenzie, 3; 3 Ersk. 3, 40; 2 Ross's Lectures, 210; Bell on Titles, 245.

Respondents' Authorities.—Cheap, 6th July 1626 (M. 17,014); Nisbet, 10th Dec. 1630 (5,682); Bready, 1st July 1662 (M. 5683); Sinclair, June 1582 (—); Home, 4th Feb. 1629 (—); Lauder, 15th Feb. 1637 (—); Wemyss, 35th July 1661 (—); Bonnack, 22d June 1748 (M. 1,695); Home, 4th Feb. 1629 (M. 15,280); Lauder, 15th Feb. 1637 (—); 3 Ersk. 8, 48; Kinloch, 4th Jan. 1678; Lord Glenlee in Duncan v. Robertson, 9th July 1813 (—); Waddle, 19th June 1828 (—); Wemyss, 10th Nov. 1768 (9174); Rowan, 21st June 1638 (13,450); Davie, 2d June 1814 (—); Keith, 17th Dec. 1703 (—); Creditors of Earnslow, 29th Nov. 1705 (—); 2 Stair, 2, 11; Kames's Elucid. Art. 35; 1 Bell, 696; Kibble, 16th June 1814 (F. C.); Baxter, 15th May 1818, 1 Bell p. '692—6; Stat. 1,617. c. 16, 1695 c. 18. Stair, 2, 11, 11; Logan, 1628 (13,342); 1 Bell, p. 692—6.

ALEXANDER DOBIE—M'DOUGALLS and BAINBRIGGE,—
Solicitors.

GEORGE BRODIE, Appellant.

No. 43.

WILLIAM SINCLAIR, Respondent.

Expenses.—A party raised an action for 219*l.* 10*s.* 3½*d.*, and the defender offered payment of 11*l.* and 10*l.*, with interest, but subject to such qualifications as did not amount to a tender; decree was pronounced against the defender for those sums, with interest amounting to 42*l.*, and the pursuer was found liable in expenses:—Held (reversing the judgment of the Court of Session), that the pursuer was not liable in expenses.

In 1827 George Brodie raised an action against William Sinclair for 219*l.* 10*s.* 3½*d.*, being the amount of an alleged account. The defender denied the debt, with the exception of 11*l.* and 10*l.*, which he offered to pay, under deduction of a counter-claim of 17*l.* The Lord Ordinary (24th June 1828) sustained “the defences as to all the articles in the account “libelled, except the cash payments on 8th and 9th February “1810, for the sums of 11*l.* and 10*l.*, and decerns for these sums, “with the interest due from said dates, till paid; but in respect “that the expense of litigation in this case had been mainly, “if not altogether, occasioned by the pursuer insisting for the “other items in the account which have not been sustained, “finds the pursuer liable in expenses to the defender, and “authorizes the defender to retain, out of the sum decerned

Sept. 23, 1831.
2D DIVISION.

Sept. 23, 1891. “for, the amount of the said expenses.” These were afterwards taxed at 58*l*.* The Court adhered, and Brodie appealed, pleading, that certain items of the account should be sustained, and that the appellant, having succeeded in his cause to the extent of 42*l*. 5*s*. 1*d*., ought not to have been subjected in expenses to his opponent; but, on the contrary, should have been found entitled to his own expenses, more especially as the respondent resisted payment of the sum found due to the appellant, alleging that it had been paid, or was more than compensated.

The respondent made no appearance.

Lord Chancellor.—My Lords, in this case I took a little time to consider whether there was any thing in the law of Scotland so anomalous as that when a person sues another for 200*l*. and recovers 42*l*., and therefore has got a judgment to a considerable amount, the Court may order him, the winning party, to pay all the costs to the other party, amounting to 58*l*.; and instead of giving him the sum recovered, leave a charge against him of 12*l*. No doubt, Lord Medwyn says, that “the expense of litigation in this case has been mainly, if not altogether, occasioned by the pursuer insisting for the other items in the account, which have not been sustained;” and therefore, because the items he mentioned had given rise to the expenses of the litigation, he ordered him, the winning party, to pay all the costs of the losing party, which gives the losing party the benefit of 12*l*. and the winning party a loss to that amount. It seemed to me very extraordinary that there should be any such rule. It is quite true that the costs are in the discretion of the Court in all cases, but I find there is no such rule as that assumed for the interlocutor. Therefore I am disposed to advise your Lordships to reverse that part of the decree of the Court of Session. But then I am referred by the respondent to his offer in the nature of a tender. No doubt if the defendant, who has lost to the amount of 42*l*., had tendered at the early part of the suit, and offered to pay that into Court, I should, without looking very narrowly, and applying our very strict rules in England to the Scotch doctrine of tender, have been disposed to think that that bore out the opinion of the learned judge, that the costs might be paid by a party, though he should win, to the other party, though he had lost; because the effect of a

* 9 Shaw and Dunlop, p. 36.

party paying the amount into Court, or there being a tender and refusal, is, that the other party must pay the costs if he gets no more by the judgment than he had offered to pay. But I find the tender is this : “ The only articles in this account which the defendant ever knew any thing about are the two sums of 11*l.* and 10*l.*, which are there mentioned to have been given to the defender on the 8th and 9th days of February 1810, and even these the defender is satisfied were paid immediately afterwards, either by the defender himself, or his factor or trustees. But as he does not seem to have preserved any vouchers for it, he would have been perfectly ready at any time, in order to prevent disputes about such a trifle, if application had been made to him, and is still ready, to pay these sums over again, with interest.” Suppose he had lost, there would have been to be paid all the costs incurred up to the period of the action, but that was only a tender after an action brought, which will not do. Then there comes, “ But there will require to be deducted a balance of about 17*l.* still due by the pursuer for his last intromissions.” That is any thing but a tender of 21*l.*; it is a tender after action brought of 21*l.* minus 17*l.* But there is another remarkable circumstance — it is a tender the other way — it is not a tender of money to be paid to the pursuer, but a demand upon the pursuer to pay money to the defender. “ But as he does not seem to have preserved any vouchers, he is still ready to pay or give credit for these sums over again, according as the balance might otherwise stand betwixt them at the time; but at present there will require to be deducted, in addition to what balance may appear on the accounts above alluded to, a sum of 14*l.* 16*s.* 7*d.* still due by the pursuer to the defender and his trustee for the rents of a small farm on the estate of Lochend, and as the price of a certain quantity of grain in the years 1818 and 1819, per state in process, together with the interest from the respective periods there mentioned; and also another sum of 33*l.* 10*s.* 6*d.* as the price of a certain number of bolls of meal of barley, of crop 1816, delivered to the pursuer, and not accounted for, together with the interest from 1816.” I have taken the trouble to calculate these sums, and I find, instead of being a tender of 21*l.* or a tender of 42*l.*, it is a claim that the other party should pay him 60*l.*; and therefore nothing can be more wild than the supposition of this being a ground for the decision in the Court below. For these reasons I am obliged to move your Lordships that this judgment be affirmed, except so far as regards the costs so singularly ordered to be paid by the winning party to the losing party, and with that alteration that the judgment be affirmed.

Sept. 23, 1831.

Sept. 23, 1891.

The House of Lords ordered and adjudged, That the judgment appealed from be altered as regards the costs, and quoad ultra affirmed.

EVANS, STEVENS, and FLOWER,—Solicitors.

No. 44. THE OFFICERS OF STATE, Appellants. — *Attorney General—Solicitor General (Cockburn).*

EARL OF HADDINGTON, Respondent. — *Dr. Lushington—Mr. Anderson.*

King.—Found (reversing the judgment of the Court of Session), that the keeper of the King's park of Holyrood House is not entitled to work quarries in the park to any extent.

Sept. 24, 1891.

2D DIVISION.
Ld. Pitmilley.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (May 25, 1826,) ordered and adjudged, “ That so much of the interlocutor of the 24th of June 1823, “ complained of in the said appeal, as finds that the defender “ has no feudal right of property in the park of Holyrood House, “ be, and the same is hereby affirmed: And it is further “ ordered, that as to the remainder of the said interlocutor, and “ as to the other interlocutors complained of in the said appeal, “ the cause be remitted back to the Court of Session in “ Scotland to review the same: And it is further ordered, “ that the Court to which this remit is made do require the “ opinion of the other judges of the said Court of Session in “ writing upon the questions of law which may arise in the “ same, which opinion the said other judges are required to “ give; and after such review the said Court do and decern in “ the said cause as may be just.”

The Court, in applying the judgment of the House of Lords,

* 2 Wilson and Shaw, 468. In the Report of the Speech of Lord Gifford p. 480, line 12, “ Lord Haddington ” has, by mistake, been printed instead of “ Officers of State.”

adhered “ to so much of the interlocutor of the 24th June 1823 Sept. 24, 1831.
 “ as finds that the defender has no feudal right of property to
 “ the park of Holyrood House ; and in order that the remainder
 “ of the said interlocutor, and the other interlocutors com-
 “ plained of in the appeal, may be reviewed, as ordered by the
 “ said judgment, appoint the parties to give in cases.”

Cases were accordingly given in, and thereafter the following questions were laid before the Judges of the First Division and the permanent Ordinaries for their opinion :—

“ 1. Whether the grant in 1646 in favour of Sir James
 “ Hamilton, and the subsequent grants which have been found
 “ to convey no feudal right of property in the park of Holyrood
 “ House, do or do not, when the terms of the grants and the
 “ proof of usage are taken under consideration, import a right in
 “ the grantees of quarrying stones in the park, and of drawing the
 “ profits arising from such quarrying according to use and wont ?

“ 2. Whether such right has been established and confirmed
 “ by prescription ?

“ 3. Whether it is competent for the pursuers, under the
 “ present summons, to complain of any abuse or excess sup-
 “ posed to have been committed by the defender in the exercise
 “ of his alleged right of quarrying ? or what is the proper method
 “ of obtaining redress, if the right of quarrying, according to
 “ immemorial usage or to a certain extent, is held to belong
 “ to the defender ? and if the object is to limit and control the
 “ exercise of this right according to such usage, or within certain
 “ defined bounds ?

“ 4. Whether the grant imports a right to work the quarries
 “ without limitation ? and if the right is limited, what are, in
 “ law, those limitations ? and have they been exceeded by the
 “ operations complained of in the summons ?

On which the consulted judges delivered the following opinions :—

Lord President, Lords Balgray, Gillies, and Corehouse.—
 “ (1.) The grant, in 1646, in favour of Sir James Hamilton, and
 “ the subsequent grants, convey no feudal right of property in
 “ the soil of the park ; but they convey a feudal right to the
 “ office of keeper of the park, and to all the emoluments be-
 “ longing to that office. We are of opinion, therefore, that
 “ those grants import a right in the grantees of quarrying stones

Sept. 24, 1831. “ in the park, and of drawing the profits arising from such
“ quarrying to the extent sanctioned by usage, and no further,
“ because the emoluments of the keeper not being defined in
“ the grant, nor by the common or statute law, can be ascer-
“ tained by usage alone. (2.) We do not think that the law of
“ prescription applies to the case. The right of the Earl of
“ Haddington depends on the import of his grant, to explain
“ which it is necessary to refer to usage; but the grant itself
“ is unchallenged, and requires no prescription to establish or
“ confirm it. (3.) As the present summons contains a conclu-
“ sion to have it found that the defender ‘ has no right or title
“ to do or authorize any act or operation by which the property
“ of the park may be in any way dilapidated or exhausted,’ we are
“ of opinion that it is competent for the pursuers, under their
“ summons, to complain of any abuse or excess supposed to
“ have been committed by the defender in the exercise of his
“ alleged right of quarrying, provided it be an abuse or excess
“ that tends to injure the park. (4.) We are of opinion that the
“ grant does not import a right to work the quarries without
“ limitation, or, as already said, to any greater extent than is
“ sanctioned by usage. We think there is evidence in process
“ that the keeper of the park, has been in use, from the date of
“ the grant, to quarry and sell, or to permit others for his behoof
“ to quarry and sell, stones for the purpose of causewaying the
“ streets of Edinburgh, and perhaps for some other purposes in
“ the city and neighbourhood; but we do not think that sufficient
“ evidence has yet been adduced to determine the limitations of
“ the right, or to prove whether they have been exceeded or not
“ by the operations complained of. This may be made the subject
“ of further inquiry.”

Lord Craigie.—“ By the original grant in 1646 to the de-
“ fender’s ancestor, the office of keeper of the King’s park of
“ Holyrood House, formerly personal and temporary, was feu-
“ dalized and made perpetual; but the import and effect of the
“ right, as well as the extent of the emoluments pertaining to
“ the office, continued the same. It seems impossible by any
“ construction to establish by it, or by the subsequent investi-
“ tures, which are in the same terms, an immediate right to the
“ property of the soil, or to the mines or minerals to be found
“ in the lands. The defender’s predecessors, in exercising the

“ right of keepership, could not warrantably, in any way or Sept. 24, 1831.
“ form, render the grounds of the park less fit for a royal re-
“ sidence, or prevent the king or his family, or individuals
“ having the use of the palace, from enjoying all the accom-
“ modations to which he was entitled while the keepership re-
“ mained in its original state. They could not be permitted to
“ do any thing which would diminish the advantages of the
“ park, or even the beauty or amenity of the place. As to the
“ emoluments of the office, if the nature and extent of them
“ at the date of the original grant could be established, these
“ and these only could be demanded at this time ; and although
“ they cannot now be correctly ascertained, this much appears,
“ that besides the keeper’s house, and the use of the grounds
“ not necessary for the King and his household, the keeper had a
“ small annual salary, varying in amount at different times, he
“ being obliged to employ under-keepers and to prevent intruders,
“ and occasionally to supply certain quantities of hay and fodder,
“ which might be wanted at the palace. As to the working of
“ the quarries for sale, it could not be in the contemplation of
“ any of the parties. It appears that the magistrates of Edin-
“ burgh were authorized to take stones for paving the streets from
“ that part of the rock called Salisbury Craigs, in general, with-
“ out consulting the keeper, although some compensation might
“ be made for the injury to the grass, and disturbing the cattle
“ and sheep ; and there seems to be no reason to doubt, that after
“ the accession of the royal family of Scotland to the English
“ throne, while on the one hand the salary of the keeper would
“ be discontinued, he, on the other hand, would be relieved
“ from his services at the palace, as well as from giving in an
“ account of his intromissions, if at any time required. In this
“ way, however, the rights of the Crown, and the corresponding
“ services, or other limitations incident to the right of the keeper
“ of the park, suffered no alteration ; and at this time, were
“ the King to establish his residence at Holyrood House, or to
“ give the use of the palace to any one, it could not be war-
“ rantably asserted that the keeper had acquired any broader or
“ better right. Indeed it is not asserted that the general extent
“ of the defender’s right, as it originally stood, has been in any
“ degree improved ; and with regard to the working of the
“ quarries for sale, it may be plainly traced to a misconception

Sept. 24, 1831.

“ on the part of the agents and managers of the family of
 “ Haddington, who confounded the feudalized right of the
 “ keepers of the park with a grant of the property. This ap-
 “ pears from the terms of the leases exhibited in the appendix
 “ to the cases. The whole of them, without one exception,
 “ give to the earls the designation of ‘ heritable proprietors’
 “ of the lands; thus ascribing the exercise of a power which they
 “ had not to a right which never could be justly claimed by
 “ them, and which is now abandoned. In such circumstances
 “ the defender and his predecessors could acquire no right by
 “ prescription, because the title to which they ascribe their
 “ right did not exist; but although they had been possessed of
 “ an *ex facie* title, it does not appear that the possession of the
 “ keeper, occasional and fluctuating as it seems to have been,
 “ would create a right of any sort against the true owner. It
 “ may be possible for an adjoining proprietor, by possession held
 “ as part and pertinent of his lands, to acquire a right of servi-
 “ tude over the property of his neighbour; but it seems quite
 “ impracticable for one, having a right as perpetual keeper of
 “ a park or forest, to acquire by possession a right to a servi-
 “ tude not warranted by but inconsistent with the nature and
 “ tenor of his right. If this opinion is well founded, the judg-
 “ ment of the Court will be in terms of the declaratory con-
 “ clusions of the libel. It is quite unnecessary to allege the abuse
 “ of a right where no right exists; and although it may be some-
 “ what irregular to allege abuse without a formal proof, yet in a
 “ case of such notoriety it cannot be thought unwarranted to say,
 “ that holding, or supposing that the defender had a right of
 “ quarrying for sale, he could not be permitted to exercise the
 “ right in the manner practised for many years past.”

Lord Cringletie.—“ In 1554 the city of Edinburgh, as is
 “ proved by its records, had the privilege of quarrying stones
 “ in the park for paving its streets, and I think that the city
 “ exercised this privilege by their own workmen down to 1664.
 “ Certain it seems to be that they continued to do so thirty-one
 “ years after the office of keeping the park was granted to Sir
 “ James Hamilton, because the records of the city, in 1675, prove
 “ that Bailie Hay was appointed ‘ to speak with Sir James
 “ Hamilton, that in setting of the King’s park there be liberty
 “ reserved to the good town to win stanes, and lead the same

“ from the said work, for helping and making the public calseys ;’ Sept. 24, 1831.
“ and the proceedings between the city and Andrew Sinclair,
“ so late as 1764, lead to the self-same conclusion, as he at that
“ period offered to furnish causewaying stones to the city to re-
“ lieve them from the payment of 20*l*. which they paid yearly to
“ the tacksman of the park for the privilege of taking stones, and
“ to purchase all the tools and implements which the city then
“ possessed for quarrying for themselves. In 1711 the then Earl
“ of Haddington let to David Smith the park for nine years,
“ but prohibited him to win any stones except for causeways,
“ which must have been for the use of the town. In 1748 the
“ earl’s commissioners let to George Knox the park as last pos-
“ sessed by David Smith ; so that, as the lease to the latter was
“ for nine years only, he must have possessed for eighteen years
“ by tacit relocation ; and in the lease to Knox, which was for
“ twenty-one years, he was empowered ‘ to open and work stone
“ quarries and causeway stones in any part of the ground of
“ the said lands, and to sell and dispose of the stones worked
“ out of the same at their pleasure.’ This is the first time the
“ indiscriminate working of stone appears to have been let by the
“ Earls of Haddington ; and indiscriminate it may well be called,
“ as Knox might have opened a quarry under the windows of
“ the palace, and covered the surface of the fine grass with
“ rubbish.

“ It does not, however, appear that he used his right, or
“ worked the quarries at all ; but it is probable (although the
“ fact is not established) that in 1764 he had sublet the right
“ of quarrying to Andrew Sinclair, because it was in that year
“ Sinclair entered into the agreement with the city to which I
“ have alluded, which he could not have done without powers
“ from Knox, as his lease of the quarries was then current.
“ Such seem to me to be the facts appearing by the evidence
“ in process, so that the Earls of Haddington never wrought the
“ quarries in the park, nor let them till 1748. In that year they
“ were let to Knox ; but until 1764 there is no evidence of their
“ having been worked for any other purpose than paving the
“ streets of Edinburgh. I do not think it necessary to detail
“ the words of the grant, in 1646, by his Majesty Charles the
“ First to Sir James Hamilton. It is established now beyond
“ dispute that it did not convey the feudal property to the

Sept. 24, 1831. “ grantee; it is equally indisputable that it did not convey,
“ per expressa, the mines and minerals. And with regard to
“ the charter in 1691, it does not appear to me to make any dif-
“ ference. It is a charter of progress, containing no *novedamus*
“ by the Crown, and its dispositive clause is nearly in the same
“ words with the original grant. The *tenendas* are somewhat
“ broader than that clause in the first grant; but this cannot make
“ any difference on the right, as every one knows that in rights
“ flowing from the Crown the *tenendas* is a matter of mere form,
“ and cannot add to the right contained in the dispositive part
“ of the charter. See Erskine, b. ii. tit. 3. sect. 23d and 24th.
“ The right, then, is merely that of the office of keeper of the
“ park, ‘with all the fees, casualties, dues, and privileges be-
“ longing to the same;’ and whether these words shall be con-
“ strued to extend to the fees, casualties, &c. of the park or of
“ the office does not appear to me to make any difference. It is
“ established that the grant conveyed no right of property, and
“ it is clear that it did not convey the mines and minerals.
“ There is no evidence of the quarries having been wrought,
“ either by the proprietors or any one else, except the city of
“ Edinburgh, for causewaying its streets, either before the grant,
“ at its date, or for 100 years after; so that the only possible fee,
“ profit, casualty, or dues that could then exist was a fee or
“ casualty paid by the city for the right of carrying away stones.
“ To that I am of opinion the keeper of the park was and
“ may be still entitled, but that is altogether different and dis-
“ tinct from the right of working the stone-quarries. If the
“ city choose to desist from taking these stones, the payment
“ must cease. It being established that no right of feudal property
“ was granted, I am of opinion, that even if the quarries had
“ been wrought in 1646, it would not be legal to explain the
“ grant to the Earls of Haddington, by the use of the sub-
“ ject, while the feudal property and the possession were united.
“ A life-renter of an heritable subject has not the feudal property,
“ which comprehends the *jus disponendi* as well as of *utendi et*
“ *fruendi*; and therefore he cannot explain his right of life-rent
“ by the use that was made of the subjects life-rented by the full
“ proprietor. The life-renter cannot cut timber, nor work stone
“ quarries or coals, although both of these may have been done
“ by the proprietor, and I think that this rule must be applied to

“ the grant in question. As to the right having been acquired Sept. 24, 1833.
“ by prescription, there seems to be no doubt that there has
“ been possession by working the quarries since 1764; but pos-
“ session is of no sort of importance in a question of prescription
“ of right to a feudal subject, unless there have been a legal title
“ on which prescription was to begin its course. Lord Haddington,
“ no doubt, has a feudalized right of the office of keeper of
“ the park, with all the ‘ fees, casualties, dues, and privileges
“ belonging to the same;’ but such a right of keeping appears
“ to me to apply exclusively to the surface, and not to the per-
“ mission of taking and carrying away the solid substance of the
“ grounds, such as the mines and minerals. As it is impossible
“ to dispute for a moment that the minerals in the bowels of the
“ earth are a part of the ground, or that, when land is conveyed
“ in full property to any one, the conveyance does not compre-
“ hend every thing from the surface to the centre of the earth, it
“ appears to me to follow directly that the finding that the noble
“ defender ‘ has no feudal right of property in the park of
“ Holyrood House ’ finds also that he has no title on which he
“ can acquire a prescriptive right to the minerals, among which
“ I comprehend the rocks of stone. I answer, then, to the first
“ query proposed by the Court, that the grant to the noble de-
“ fender’s predecessors does not import a right to quarry stones
“ in the park, or of drawing any profits therefrom, except any
“ consideration that may be paid by the city of Edinburgh for
“ taking paving-stones for its streets. 2d. I do not think that
“ the right has been or could be acquired by prescription, since
“ there is no title on which it could begin to take its course.
“ 3d. I am of opinion, that as the noble defender has no right
“ to the quarrying of stones, the present action is quite appro-
“ priate to have that declared. But although it were the opinion
“ of the Court that his Lordship has a limited right, I think,
“ that as the Court are empowered, under the summons in this
“ action, to declare in terms thereof, so they are authorized to
“ declare only a part; that is, to limit the right of the pur-
“ suers, and, as a matter of course, to assoilzie the noble
“ defender quoad ultra. The 4th question is answered by what
“ I have observed on the other three. I can only add, that I
“ cannot conceive in what abuse can consist if the operations
“ complained of in the summons do not amount to it, unless it be,

Sept. 24, 1831. “ that it might consist in opening a quarry close to the pa-
 “ lace. But if there be a right to quarries in general, the noble
 “ defender is entitled to work them every where; and there
 “ can be no abuse in using the right if it be not done in mere
 “ wantonness.”

Lords Meadowbank, Medwyn, and Newton.—“(1.) The grant
 “ in 1646, in favour of Sir James Hamilton, and the subse-
 “ quent grants, convey no feudal right of property in the soil
 “ of the park, but they convey a feudal right to the office of
 “ keeper of the park, and to all the emoluments belonging to
 “ that office,—the office, which was previously personal and tem-
 “ porary, being now made a feudal grant, and perpetual in the
 “ person of the grantee and his heirs male. We are of opinion
 “ therefore, that those grants import a right in the grantees
 “ of drawing the profits arising from the park to the extent
 “ sanctioned by the usage at the time of the grant, or imme-
 “ diately subsequent to it, and no farther; and that the emolu-
 “ ments of the keeper, not being defined in the grant, can be
 “ ascertained by such usage alone. (2.) We do not think that
 “ the law of prescription applies to the case. The right of the
 “ Earl of Haddington depends on the import of his grant, to
 “ explain which it is necessary to refer to usage. If the grant
 “ were challenged, prescription would establish or confirm it.
 “ But the grant is not challenged; it is only the import of it
 “ which is the subject of discussion. It would also afford a title
 “ to prescribe in a question with any conterminous proprietor
 “ as to the boundaries of the park; but it can afford no title of
 “ prescription against the granter, to the effect of altering the
 “ nature of the grant, or extending the powers of the keeper, so
 “ as to give him those of a feudal proprietor. (3.) As the pre-
 “ sent summons contains a conclusion to have it found that the
 “ ‘ defender has no right or title to do or authorize any act or
 “ operation by which the property of the park may be in any way
 “ dilapidated or exhausted,’ we are of opinion that it is com-
 “ petent for the pursuers, under their summons, to complain of
 “ any abuse or excess supposed to have been committed by the
 “ defender in the exercise of his alleged right of quarrying, pro-
 “ vided it be an abuse or exercise that tends to injure the park.
 “ (4.) We are of opinion, that as the grant does not contain
 “ any express right to work the quarries, a right to do so can

“ only be claimed in virtue of a usage at the date of the grant, Sept. 24, 1831.
 “ and that it cannot be carried to any greater extent than is
 “ sanctioned by such usage. We think there is evidence in
 “ process that prior even to the date of the grant, and subse-
 “ quent thereto, the magistrates of Edinburgh were allowed to
 “ quarry stones for the purpose of causwaying the streets of
 “ Edinburgh; but we do not see any evidence adduced or
 “ offered, that at the date of the grant, or for many years
 “ after this date, the keeper worked quarries for general sale;
 “ nor do we think that such a practice would have been con-
 “ sistent with the purpose of the grant, which, while it gave a
 “ valuable office to a favoured subject and his descendants, was at
 “ the same time intended to preserve the park in a proper state
 “ for being an appendage of a royal residence. The evidence laid
 “ before the Court, in the case between the Earl of Had-
 “ dington and the first minister of Canongate, shows that the
 “ town of Edinburgh contributed (1541) to build the wall round
 “ the park, and also that they agreed to put on gates, and to
 “ build up (1554) the slaps in the park dike, occasioned proba-
 “ bly by their quarrying the causeway-stones. Although, for the
 “ improvement and benefit of the capital of the kingdom, the
 “ King might allow stones to be taken from the park, for which
 “ privilege the town seems to have thus assisted in inclosing it
 “ we do not think that against the will of the Crown any such
 “ limited use of the quarry could be continued, far less extended,
 “ by the keeper, whose duty it was to guard the subject of the
 “ grant from all encroachments, to the effect of quarrying for
 “ general sale, or that any such extension has been secured
 “ from challenge from not having been previously checked. We
 “ therefore are of opinion that the keeper has not the right of
 “ working quarries within the park for sale generally; he may,
 “ however, quarry stones for the use of the subject itself.”

Lord Mackenzie. — “ (1.) I think that the right of the noble
 “ defender is only that of heritable keeper of the King’s park of
 “ Holyrood House, with the power of levying the profits of that
 “ park for his own use. There appears nothing to show that this
 “ park was ever intended to be disparked, to be wholly separated
 “ from the royal palace to which it was attached (which remains
 “ a royal residence at this day), and to be converted into ordinary
 “ property, in which the King had no longer any right or interest

Sept. 24, 1831.

“ at all. On the contrary, this idea is excluded, not only by the
“ terms of the charters, but, so far as appears, by the general
“ state of use and possession, ever since the date of the first grant.
“ I do not think, therefore, that the defender has, generally, right
“ to dispose of this ground, so that it shall no longer remain
“ a park — *exempli gratia*, to turn it into streets, or villas, or
“ private gardens, or markets, or manufactories, or work-yards,
“ or nursery-grounds, &c., as if it were ordinary landed property
“ in the vicinity of the town. He is to keep it as a park, and
“ to take to himself the profits of it as such. Of course, then,
“ abstracting from special grounds, he cannot have a right to
“ work quarries in this park for sale, that being eminently in-
“ consistent with the keeping of a park, consuming and alienating
“ the solum, turning the pasture into waste and rubbish, and
“ being of such a nature that it can never stop till this park,
“ which consists mostly of grass above rock, is destroyed. But
“ it is said, that working quarries for sale may be construed to
“ be part of the profits of the park conveyed to the hereditary
“ keeper by the charters, and that this interpretation is forced
“ upon the words by proof that there were quarries in the park
“ worked for sale prior to and at the date of the original grant,
“ the price of the stones wrought out forming part of the
“ ordinary profits of the park at that time. There might, I
“ think, be difficulty in admitting the relevancy of this, even
“ if it had been correct in point of fact. It would be some-
“ what difficult to hold, that because, while under the disposal
“ and control of the royal proprietor, quarries had been
“ wrought to some extent, which working of course he might,
“ and indeed must, have been ready to stop at any time, if it
“ became materially injurious to his park, therefore he must, in
“ making a grant of hereditary keepership of this park to a sub-
“ ject, with right to levy the profits of it without account,
“ have intended to authorize the perpetual continuance and
“ unlimited extension of this quarrying by the keeper at his mere
“ pleasure, and without control, even to the injury or destruc-
“ tion of the park. But it is needless to go into that, for I do
“ not see any proof that there was any quarry wrought for sale
“ in the King’s park at the time of the first grant, or for a
“ great many years after it. The town of Edinburgh seems to
“ have had some sort of limited privilege of taking stones for

“ paving. I see in the History and Life of King James VI. Sept. 24, 1831.
 “ (page 395), lately printed, that in 1616 ‘express command
 “ was directed from Court to repair all common and straight
 “ wayis and passageis with calsayis of stane wark.’ Now, it is
 “ very probable that on this or similar occasions the magistrates
 “ of Edinburgh obtained permission from the King to take stones
 “ from the park, without any intention on the part of his Ma-
 “ jesty to open perpetual quarries in his park, for profit either
 “ to himself or his keeper. This privilege of the town, there-
 “ fore, goes no length to show that there were quarries in the
 “ park wrought for sale, and of which the product could be
 “ regarded as the profits of the park; and I do not see any
 “ thing in the proof of usage which can support the right of
 “ working quarries in the park, more than any other alienative
 “ or destructive disposal of it. (2.) I do not think that such
 “ right could be acquired or can be supported by the positive
 “ prescription of forty years. It is curious that the four leases
 “ which the noble defender has produced to aid this plea are
 “ all granted by the keeper, not as such, but as ‘heritable
 “ proprietor,’ so that it might rather seem the noble defender
 “ ought to plead prescription of the property altogether by
 “ virtue of the possession on these leases. But I see no room
 “ for any plea of prescription in the case. I do not think that
 “ the grant of keepership, abstracting from any extensive inter-
 “ pretation of the profits granted to the keeper from usage
 “ prior to and at its date, furnishes a title for positive pre-
 “ scription of the property generally, or of right to any exercise
 “ of property that is beyond the keepership, and therefore do
 “ not think it furnishes a title for prescription of a right of so
 “ decidedly consumptive and alienative a kind as this. Nor
 “ indeed is it, or can it be said, that there has been any possession
 “ of such a kind as could warrant prescription generally of the
 “ right of ordinary property in this subject, and dispark it, wholly
 “ excluding the King’s right and interest in it. It has not only
 “ been held by the title of keepership of a park, but seems to have
 “ been possessed as the King’s park generally. In this situation
 “ I cannot see how it is possible to hold that any partial use of
 “ unnoticed alienative disposal for forty years by the keeper
 “ could give a prescriptive right to continue such disposal after
 “ it was objected to by the King, and to go on with it to an

Sept. 24, 1831.

“ unlimited extent. (3.) As the summons contains a conclusion
“ to have it found that the ‘ defender has no right or title to do
“ or authorize any act or operation by which the property of
“ the park may be in any way dilapidated or exhausted,’ I am
“ of opinion that it is competent for the pursuers, under their
“ summons, to complain of any abuse or excess supposed to have
“ been committed by the defender in the exercise of his alleged
“ right of quarrying, provided it be an abuse or excess that tends
“ to injure the park. (4.) I think there is no right to work
“ without the King’s leave, for general sale, to any extent. If any
“ limitation at all was applicable to such a right, I think it must
“ be this, that the quarrying should stop as soon as it became
“ materially hurtful to the park in any respect.”

Lord Moncrieff.—“ (1.) It is a settled point that the noble
“ defender has not, under the charters, any feudal right of property
“ in the King’s park. He has, however, a feudal title in the office
“ of keeper of the park, with the profits and emoluments which
“ may be held to belong to it ; and this being an estate of inherit-
“ ance in his person, I conceive that, in regard to all the benefits
“ clearly attached to it, the right established in it goes far beyond
“ a mere power of custody under any commission from the Crown.
“ The right is so vested that not only it could not be recalled by his
“ Majesty, but I humbly apprehend that, except with reference
“ to the actual use of the palace as a royal residence, it would not
“ be competent for the Crown to resume any use or command of
“ the grounds of the park for profit, whereby the keeper’s estab-
“ lished enjoyment of it might be destroyed or materially injured.
“ But, as there is still no title of property carried by the grants,
“ and as the beneficial uses are not therein defined, otherwise than
“ by a reference in general terms to the issues and profits, either
“ of the office, or, as I rather think, of the park itself, the nature
“ and measure of them must be determined by principles of law,
“ or by usage legitimately applied to those principles. In general,
“ titles affecting property in land, which consist in a right of
“ custody, possession, and enjoyment only, are confined to the
“ ordinary uses of the surface, as capable of yielding annual fruits,
“ and do not extend to the working of minerals or other extraor-
“ dinary acts, whereby a part of the subject itself is withdrawn or
“ destroyed, or the nature of it may be essentially and permanently
“ changed. If the present question, therefore, depended simply

Sept. 24, 1831.

“ on the terms of the grants, without any usage to explain them,
“ I should be of opinion that the Earl of Haddington, as keeper,
“ had no right to work quarries within the park, except, perhaps,
“ for the necessary uses of the palace or the park itself. But,
“ attending to the peculiar nature of the right, and to the consi-
“ deration that the Crown has, in my apprehension, effectually
“ alienated from itself the command of these grounds for any
“ purpose of profit or emolument, I am further of opinion, that
“ the ordinary presumption arising from the limited nature of the
“ title may be overcome by usage, and that the terms of the grant
“ are sufficient to carry a right to the profits arising from stone
“ quarries, in so far as there has been a usage by the keeper of
“ working such quarries, and drawing the profits. This right,
“ however, supposing it to exist, may be liable to an exception or
“ limitation to which I shall advert in answering the fourth ques-
“ tion stated. (2.) I am of opinion that the law of prescription
“ does not apply to the case. The charters and seisines held by
“ the defender would afford a very good title of prescription if
“ the question related to the validity of the grant, because the law
“ of positive prescription does certainly apply to heritable rights,
“ which are not titles of feudal property. But here the validity
“ of the title is admitted, and the only question is, what it carries.
“ This must be determined by the terms of the grant; and though
“ I think that these terms may be explained by usage, I do not
“ hold that any right has been acquired by positive prescription
“ which may not, by fair construction, be taken to be compre-
“ hended in the grant, as so explained. (3.) I am of opinion that
“ the terms of the summons are sufficient to entitle the pursuers to
“ complain of any abuse or excess in the exercise of the assumed
“ right of quarrying, in so far as a relevant case for such complaint
“ can be established. (4.) I am of opinion that the grant does,
“ neither by its own terms nor under any just construction of it,
“ as explained by usage, import a right to work quarries without
“ limitation. I think that the limitations of it in law must be
“ found in two principles.—1. That it cannot go beyond the
“ general nature of the usage on which it rests; and, 2. That
“ it cannot, either in acts apparently of the same kind with those
“ embraced by the usage, or in any other manner, be carried to
“ such an extent as to destroy or materially injure the park.
“ Under both principles I should hold any attempt to open a

Sept. 24, 1831.

“ quarry, in any situation where it would directly affect the character of the palace as a place of residence, to be excluded ; and, under the second, I think that the working even of quarries, the use of which has been practised to some extent since the date of the grant, may be carried to such an extent as, by producing evident injury to the park, to become inconsistent with the nature and spirit of the grant. I am further of opinion that there is sufficient evidence of a usage by the keeper of quarrying and selling, or permitting others for his behoof to quarry and sell, stones for laying the causeways of the city of Edinburgh. I think it very doubtful whether the evidence establishes a usage beyond this during any long or connected period, though, perhaps, it might be shown to extend to some other public purposes in the city and the neighbourhood. I do not think that there is any proof of a usage of quarrying for general sale or exportation ; and in answer to the last part of the question, so far as the materials in process enable me to form an opinion, I think, on the one hand, that the operations in quarrying had gone beyond the limits of the previous usage ; and, on the other, that there is not sufficient ground for holding that, up to the date of the summons, those operations had done any material injury to the park. But, I am of opinion, that if such quarrying should be continued for a farther course of years, to the extent lately practised, as represented by the pursuers, it must produce such material injury.”

The Second Division of the Court, on resuming consideration of the case, delivered the following opinions :—

Lord Justice-Clerk.—“ I have read the papers in this case with all the attention in my power, and also the opinions of the learned judges, whom we were called on to consult by the remit from the House of Lords. We have these opinions now before us, and I shall shortly state what is the result of the opinion to which I have come. And in the first place, with the exception of one point, entertaining, I fairly own, some doubt as to the application of the doctrine of prescription at all to this case, under the circumstances in which it is presented,—with this exception, I freely confess, that on considering the case with all the attention in my power, and looking to the supposed difficulties in reconciling the judgment of this Court with that of the court of last resort, I retain the opinion which I had formerly formed.

“ It appears to me impossible to doubt that this grant is one of a
“ very singular and anomalous nature. It is not a mere hereditary
“ grant of the keepership of the park, for it is as clear to me as
“ the sun at noonday that there is conveyed to Lord Haddington,
“ not the custody and keepership of this park merely, but also the
“ whole profits, benefits, emoluments, advantages, and valuable
“ considerations which were derivable from that office, which were
“ given to him and his heirs in the most unqualified manner.
“ These have been feudalized in his person, and under the grant
“ he is entitled to enjoy them. Then the question comes to be,
“ whether this be a right which carries what were the advantages
“ and emoluments at the date of the original grant to Sir James
“ Hamilton in 1646, and the conveyance to Lord Haddington’s
“ family in 1691, which, if possible, was more extensive in its terms;
“ and, if the right does carry these benefits, what were the advan-
“ tages which, on his entering on the office, he was entitled to enjoy,
“ and he and his predecessors have continued to derive from it
“ since that time? Now, my Lords, here my opinion is very much
“ the same with that embraced in the opinion of Lord Moncrieff,
“ which is most accurate and able, and with the opinions of the
“ Lord President and the three judges who concur with him. In
“ the first place, I think that nothing which, by usage, the defender
“ has had and possessed as his own, can be taken away from him;
“ in the second place, I think that his right is not of an unlimited
“ nature, and that he is not arbitrarily entitled to extend the words
“ of the grant, in exercising it, so as to abuse the right. If it were
“ discovered, for example, that there was a valuable quarry under
“ the walls of the palace, it is altogether out of the question to hold
“ that he would be entitled to open and work it to the utter de-
“ struction of the very subject he is bound to preserve. I have not
“ the slightest shadow of a doubt that he is not entitled so to extend
“ such a grant. With regard to the other matters, we are not
“ bound to answer all the points that may be started; we are
“ only bound to answer the questions of law; and when I say, that
“ while the right is to be regulated by usage in its exercise, and is
“ not of an unlimited nature, and that prescription does not
“ apply to such a case, there appears to me to remain only one
“ other point for consideration, and which was also under con-
“ sideration in the House of Lords. We qualified our interlocutor,
“ adhering to the Lord Ordinary’s judgment, by inserting the

Sept. 24, 1831.

Sept. 24, 1831.

“ words, ‘ in respect no abuse is alleged to have been committed ;’
 “ and I am of opinion, although it has been said that we cannot
 “ get at that under this summons, that this summons does permit
 “ the Court to inquire into the question, Whether there has been
 “ any abuse by the defender of his right ? I think we are entitled
 “ to dispose of that matter under this summons ; but while this is
 “ my clear opinion, there is an observation made in the concluding
 “ part of the opinion of my Lord President, and of the other
 “ judges who concur with him, in which I entirely agree, that ‘ we
 “ do not think that sufficient evidence has yet been adduced to
 “ determine the limitations of the right, or to prove whether
 “ they have been exceeded or not by the operations complained
 “ of.’ I do not think we have materials before us at present for
 “ judging of that question, whether there has been that gross abuse
 “ which exceeds the limits of the grant. It is stated in the case
 “ for the officers of state, that there has been a large quantity of
 “ whinstone taken away, &c. All this may be very well, and so
 “ may be the matter as to the disfiguring of the crags, and in-
 “ juring the beauty and amenity of the park, as a matter for
 “ further inquiry ; but at present I do not think we can de-
 “ cide upon them. At present I am of opinion that Lord
 “ Haddington is entitled to enjoy the full advantages of his office,
 “ both according to ancient and more modern usage,—both ac-
 “ cording to the practice when he entered into it, and by the
 “ practice for a length of time, from which it appears that he
 “ derived emolument from quarrying stones within the park.
 “ That is my opinion, unless there is an undertaking, on the part
 “ of the pursuers, to prove that there has been an actual abuse of
 “ such right.”

Lord Pitmilley.—“ My Lords, as I was Ordinary in this case,
 “ and as I think some misapprehension has been entertained in
 “ regard to the interlocutor which I pronounced, I wish to make
 “ a few observations ; and I shall begin what I have to state by
 “ making some remarks on the points which I think it compe-
 “ tent for us to decide under this summons. My Lords, when
 “ this case came before me in the Outer House, I paid parti-
 “ cular attention to the terms of the summons, and I saw, as it
 “ appeared to me, evidently two different grounds on which the
 “ action was rested, which seemed to me not only distinguished
 “ from each other, but to stand opposed to each other, so that

Sept. 24, 1831.

“ if the one be adopted the other must be relinquished. The
“ Crown may say, first, that Lord Haddington has no right at
“ all to the quarries—that they are part of the soil and substance
“ of the property to which he has no right; or, second, the
“ Crown may admit that he has a right to work the quarries,
“ but that he is under control, and must be regulated by use
“ and wont in the exercise of the right. Now it is quite plain
“ to me that these two pleas are directly opposed to each other,
“ and that the one cannot be called in to assist the other. If
“ there be no right to the quarries at all on the one hand,
“ there is and can be no question as to the extent to which the
“ right may be used; there is no need of such a question, and
“ there is no room for inquiry into it. On the other hand,
“ if it be said that the defender has exceeded his power in
“ working the quarries, does not this necessarily proceed on the
“ admission that he has right to work them to some extent?
“ I wish to attend to this, in order to see on which of the
“ grounds it is taken up by the pursuers. Now, the conclusion
“ of the summons is, ‘ that the said Charles Earl of Haddington
“ and his successors in the office of the keeper and ranger of
“ our said park of Holyrood House, have no right of feudal pro-
“ perty thereto, and no right or title to work quarries, or to do
“ or authorize any act or operation by which the property of
“ the said park may be in any ways dilapidated or exhausted.’
“ These are the whole conclusions of the summons; and I hold
“ that they are just one conclusion—that the defender cannot have
“ right to work quarries at all, and that there is nothing else
“ brought to an issue in this summons. There is no conclusion as
“ to his right if he does not go to excess in working, but it is a
“ conclusion that he has no right whatever. Some of the judges,
“ in their opinions, seemed to think it competent to inquire into
“ this matter, and referred to the conclusion, that the ‘ defender
“ has no right or title to do or authorize any act or operation
“ by which the property of the park may be in any way dilapi-
“ dated or exhausted.’ But I think that is just a repetition of
“ the conclusion that he has no right to work at all; and therefore
“ I would have expected, that if there was to be any thing of the
“ nature of an admission as to his right to be founded on, that it
“ should have been stated in the summons alternatively. But
“ there is nothing of the kind to be found in it. I have read the

Sept. 24, 1831.

“ summons again and again, and there is no such thing contained
“ in it. I make these remarks, because I think that the inter-
“ locutor which I pronounced has been misunderstood. It has
“ been said that this interlocutor establishes an unlimited right to
“ work quarries. I am sure it was not intended to do so, and
“ when it is attended to I think this will be evident; it merely
“ gave an absolvitor from a summons which contained only a
“ conclusion that the defender Lord Haddington had no right to
“ work quarries at all, but certainly did not find that he was
“ entitled to work them without control or limitation. I think
“ his Lordship is limited by usage and by his grant; but I did
“ not think it necessary to find any thing as to that, as there was
“ nothing regarding it in the summons. I still think, as the
“ summons is expressed, it is merely to have it found that Lord
“ Haddington had no right to work quarries at all, and that there
“ is nothing else brought before us by it in this action. If I must,
“ however, go into the merits of the case, the first question is,
“ Whether these grants, taken along with the usage, import a
“ right in the grantee to quarry stones, and derive profit from so
“ doing? Now, I agree with the majority of the consulted judges,
“ and with the former interlocutor, in answering this question in
“ the affirmative. It is a grant, I think, of the office of keeper of
“ the park, with all the emoluments and profits belonging to the
“ park, of every kind, and is expressed in very broad and com-
“ prehensive terms,—the emoluments and profits belonging to the
“ park, and not merely to the keeper of the park. These are, in
“ the first place, the words of the grants themselves; but, in the
“ second place, there were not at first any emoluments or profits
“ belonging to the office; and if there were, it would have been
“ necessary to enumerate them; but although there were no
“ profits belonging to the office, there were profits of the park—
“ there were grounds—there were quarries that might give profit,
“ and the usage of two hundred years confirms the words of the
“ grant. He has right only to the fruits, and to no part of the
“ solum; but the extent to which the right of working exists
“ must be measured by the words of the grant, and the usage that
“ has followed upon it. On the next question I shall say very
“ little, viz. whether Lord Haddington has established a right by
“ prescription? I have certainly very great doubts if prescription
“ can apply to this case, since I have read the opinions of the

“ consulted judges, and which, I confess, have rather led me to Sept. 24, 1831.
 “ alter the opinion I formerly entertained, although I am still
 “ somewhat at a loss to see why prescription may not apply to
 “ such a case. The only remaining question is, whether Lord
 “ Haddington has a right to extend the working, or may be
 “ limited in its exercise? I have already said that I do not think
 “ this point is embraced by the present summons; but if it is
 “ competent to consider it under this summons, I am clear that
 “ the defender must be limited by the usage and terms of the
 “ grant, and agree with the other judges in this; and I also agree
 “ with them in opinion that the limits are not precisely brought
 “ before us, and that we cannot decide this until we have further
 “ information and inquiry.”

Lord Glenlee.—“ Although Lord Haddington might have
 “ exercised the right of quarrying for sale, yet he is not entitled
 “ to use this to the destruction and dilapidation of the subject
 “ itself, to which he has not any right. He is bound not to
 “ destroy the subject; that is a perpetual condition, against which
 “ he can never prescribe. The Court, by its first interlocutor,
 “ assoilzied from the action, but did so in respect there was no
 “ abuse alleged; but if they now allege such abuse, where is the
 “ difficulty of inquiring into it in the process, when there is a
 “ conclusion against the exercise of the right at all? If the
 “ recent usage had been that of quarrying to a very great extent,
 “ I am not prepared to say he is entitled to continue that.”

Lord Justice-Clerk.—“ We must endeavour, the best way we
 “ can, to extract and discover what, upon the whole opinions, is
 “ the judgment we are to pronounce, which must be in terms of
 “ the opinions of the whole judges, without regard to the division
 “ of the Court in which the case happens to be. Now, from the
 “ opinions, it appears to me that Lords Craigie, Meadowbank,
 “ Newton, and M'Kenzie, although there are shades of difference
 “ between them, yet generally are in favour of the pursuers.

“ The opinions of my Lord President and the three other
 “ judges who concur with him in his opinion, and Lord Moncreiff,
 “ as I draw the conclusion at least from his lordship's opinion, are
 “ generally in favour of the defender. These are five opinions,
 “ and there are two of the judges present who concur in that view.
 “ Lord Glenlee's opinion, I think, was more qualified.”

Lord Cringletie.—“ I think there has been a usage of quarry-

Sept. 24, 1831.

“ ing stones for supplying the streets of Edinburgh ; but I imagine
 “ none of us has an idea that the defender has a right, under this
 “ grant, of quarrying[†] for general sale. The difficulty, therefore
 “ is only in framing the limitation of his right ; for we may find
 “ that he has no right to quarry for general sale, and I have no
 “ difficulty in coming to that conclusion.”

Lord Justice-Clerk.—“ It is very difficult to criticise these
 “ opinions so as to come to a satisfactory result. But I think
 “ there are some points upon which we are all agreed :—1st, we
 “ are agreed that prescription does not apply to the case ; 2d,
 “ that the right is not of an unlimited nature, but that it must be
 “ qualified by usage ; and, 3d, that any abuse or excess in the
 “ exercise of the right may be restrained. We are all agreed upon
 “ these. But to say that there is any thing proved as to the excess
 “ is difficult ; it is difficult to point out where it begins or ends.
 “ I therefore think, that if we embody these three findings in an
 “ interlocutor, and order a condescendence upon the question of
 “ excess or abuse of the right, we do all that is consistent with
 “ the case as it stands now.”

The Court then pronounced this judgment (4th June 1830) : *

“ In addition to that part of their former interlocutor of the
 “ 24th June 1823, affirmed on appeal by the House of Lords,
 “ and in terms of that affirmance adhered to by their interlo-
 “ cutor of 9th June 1826, finding, ‘ That the defender has no
 “ feudal right of property in the park of Holyrood House :’
 “ find, that in opposition to or inconsistently with the terms
 “ of the grant from the Crown, which is the defender’s title of
 “ possession, there are not termini habiles for any plea of the
 “ positive prescription in defence against the conclusions of this
 “ action, and repel that defence accordingly : find, that in consis-
 “ tency always with the peculiar nature and terms of the grant
 “ from the Crown to the defender’s ancestors and authors, the con-
 “ ditions and extent of his right must be explained, defined, and
 “ regulated by ancient and continued usage : find, that from time
 “ immemorial quarries for stones have been opened and worked
 “ within the park of Holyrood House by the defender’s ances-
 “ tors and authors ; but further find, that the defender’s right
 “ in that respect is of a limited nature, and that he has not a

* 8 Shaw and Dunlop, p. 867.

“ right to work such quarries for general and unlimited sale ; Sept. 24, 1831.
“ and before further answer as to the nature, special purposes,
“ or extent of any limited right in the defender of opening and
“ working quarries, allow the pursuers to give in a special con-
“ descence of what they aver and offer to prove as to the
“ usage in these respects, both ancient and recent; and, when
“ given in, allow the defender to give in answers thereto.”

The Officers of State appealed, in so far as the interlocutors of the Court “ do not find or imply that the Earl of Haddington
“ has no right whatever to work quarries in the park of
“ Holyrood House.”

Lord Chancellor.—I am now about to assign the reasons why I feel it my duty to advise your Lordships to take the course which appears to me, with great humility, unavoidable in this case—I mean, altogether to reverse the judgment of the Court below. My Lords, if, upon examining the grounds of the decision, with all the respect which it is possible to feel for the very learned persons who have concurred in supporting this judgment, I had found that the facts were undeniably as they assume them to be, and that the whole difference of opinion in the case was upon a point of law applicable to an unquestionable state of facts, I should then, in deference to the judgment which has been given and the authority of those learned judges, have taken more time to consider it before I advised your Lordships to reverse the judgment. But upon the best attention I can bestow upon the case, assisted by the arguments of the learned counsel, upon whom I pressed from time to time the difficulties as they struck me, I find that their Lordships have, as is but too common in Scotch decisions, taken facts for granted, and proceeded to argue and decide upon the law long before they had entitled themselves to raise the legal question, inasmuch as the facts were not established in evidence. I have no hesitation whatever in the course I am to pursue, having also an opinion, that even if the facts had been as they were gratuitously assumed to be, there is little to support this judgment in point of law.

Now, my Lords, the claim here is of a very singular nature, it must be confessed of a nature wholly novel in this country, and (as I gather from the silence of the cases in the books and of the learned advocates in this cause) equally novel in Scotland. The Crown, in the exercise of an undoubted prerogative, conferred upon the ancestor of the Earl of Haddington, Sir James Hamilton, in the year

Sept. 24, 1831. 1646, (it is said, but not proved,) in consideration of a debt of 10,000*l.*—but that is unimportant—the office of heritable keeper of the Royal Park of Holyrood House, an office of a nature sufficiently known, as well as the office of keeper of royal palaces in Scotland; one noble member of this House being the keeper of one palace, and another the keeper of another, and other noble members keepers of royal parks. Accordingly, my Lords, that office was conferred upon the Earl of Haddington's ancestor. But if I should say that it was created in his person, he being apparently the first enjoyer of it, I should certainly not go beyond the facts which appear here in the cause; for it is much more like the creation of an office for the first time than any thing else; at all events we have not any thing to show that any person exercised it before, and much less in what manner the privileges belonging to it had been enjoyed, or what the amount of those privileges had been. Now, my Lords, this appears to me to be a fact of the utmost importance, and a fact which, however important, has been wholly omitted in the consideration of the learned judges in the Court below, albeit they assume to found their opinions upon what they call the kind and extent of the usage. For what avails it to tell me how a certain person exercised certain acts on a certain property or in a certain respect, if you do not show me that that person was clothed with the particular title or with the particular office in respect of which the present claimant pretends a right to exercise the same acts? What avails it to show that stones were quarried and taken by certain persons for certain purposes at and before the time of the grant, if you do not show that those persons took the stones in the same capacity in which the Earl of Haddington claims to take them now, or that certain other persons at that time were suffered, by a person standing in the same situation in which stands the Earl of Haddington now, to take those stones, either by an acknowledgment to him for leave, or at all events by his grant of permission? But I go a step further: I suppose even that a person then in the office of keeper of the park had existed; then, no doubt, any act and permission by him given to others to take the stones would have come much nearer an act of usor, of which the present earl might have had a right to avail himself. But even if it had come to that there would still have been an interval cutting it off from the present case, and in my apprehension effectually preventing its application; for the nature of the office of keeper of the park might be well such as to make him the proper quarter to which applications should be made by others for leave to take those stones, and such grants of permission might well be construed as having taken place in the exercise of the Crown's right to allow or to

refuse leave to take the stone, that right of the Crown being exercised through the medium of the heritable keeper of the park. But there is no occasion for arguing as to what might have been the import of any such fact, if there had been such a fact in the cause, for there is nothing like it—there is no vestige of evidence—it is not even asserted in the pleading or parole arguments of the counsel, that, prior to the grant of 1646, there was such an office as heritable park-keeper in any body; and therefore I see no ground whatever—I see no possibility of the existence of a fact such as that which the majority of the learned judges seem to have assumed, namely, that there was any usor at and before the grant of Charles the First. But even if there had been, what signifies an usor, as I before urged, unless it was an usor by a person claiming in the same capacity as that in which the Earl of Haddington claims?

This being the state of the fact, I will go a step aside to illustrate this point in observing upon the language of the grant, which is very material. We find that the grant was made to Sir James Hamilton and his heirs of this office—“*hereditarium officium et*”
 “*custodiam dicti nostri roborarii, cum omnibus feodis, casualita-*”
 “*tibus, divoriis, et privilegiis quibuscunque ad eundem perti-*”
 “*nentibus, cum plena potestate prefato domino Jacobo suisque*”
 “*predictis, faciendi et constituendi, sub custodes dicti roborarii*”
 “*unum vel plures pro eorum arbitris pro que eorum officio exer-*”
 “*cendo.*” Now, my Lords, I shall refer for the present only to the *tenendas* clause, which states, “*omnibus et singulis libertatibus*”
 “*commoditatibus, proficuis, asiamentis, ac justis suis pertinentibus*”
 “*quibuscunque, tam non nominatis quam nominatis, tam subtus*”
 “*terra quam supra terram.*” But, it is a matter to be proved what those profits and advantages, under the ground as well as over the ground, are, which belonged to the office, because it instantly follows “*ad dictam officium spectantibus seu jūste spectare*”
 “*valentibus quo modo libet in futurum.*” Now, with respect to the *tenendas* clause, it is hardly necessary to remind your Lordships that the granting part of the instrument (the dispositive part, as it is called in Scotland,) formed the operative part of the grant, and that the office of the *tenendas* clause is strictly to state the person from whom holden, and to state the kind of the holding or tenure, and not to alter or enlarge the grant. This, which is always the office of that clause, has been undoubtedly of late years—for the last one hundred and fifty years—still more peculiarly its office, since, I believe, it is understood among conveyancers in Scotland that during that period the *tenendas* clause is of such a nature that it could always be dispensed with, because a good deal is generally now inserted in the dispositive part which used to form part of the

Sept. 24, 1831.

Sept. 24, 1831. tenendas clause. However, as this grant was executed some time ago, it may be taken that it was not so then; still at that time the tenendas clause most undeniably could not extend to grant what is here claimed, even if it were quite clear, that if that had been in the dispositive clause, it would have made an end of the case. But I think that is by no means clear, for I have to remind your Lordships of what the Court below does not seem to have been sufficiently impressed with, or rather, I should say, which they do not seem to have been startled at, and which a learned predecessor of mine in this situation, on looking at it as an English lawyer, was so much struck with, namely, the very extraordinary nature of this claim to be made by a person, the keeper, the custos, the preserver of a park. That he should have a right of killing game, there can be no doubt, would have been natural and easily intelligible; that he should, even as in the case of some of the forests in England, have certain cow pastures of a limited extent I can easily understand, for those things are not alien to or inconsistent or repugnant with the nature of the office of a park-keeper; but when a claim is set up to a right of going at once from keeping the park to digging quarries, and taking the mines and minerals under the surface, it seems the most extravagant demand that can be made by any person, by any officer, or through any prescription, feudal or other; but it appears still more repugnant to the nature of the office when it is recollected that this is a claim made by the representative of the grantor, for the purposes of the grant, that is to say, of keeping the park for the profit or the pleasure of the grantor, and yet he is to set up, as against that grantor, a right—not to keep, but to take—not to preserve, but to destroy—not to hold and superintend and protect, and exclude intruders and destroyers and committers of waste, for the sake of the Sovereign who appointed him to hold the office under him, but, in despite of the Sovereign, to destroy and spoil and waste himself. A waste of a grosser kind cannot be conceived by a lawyer than that of actually taking the ipsum corpus of the premises under his custody, destroying it irreparably and for ever. And when I put a question to the learned counsel as to what limits he placed to the right, he was in exceeding great difficulty, for he said he did not mean to go so far as to say that a man who was appointed to keep a park had a right to destroy it altogether; he did not mean to say that he had a right wholly to take away the quarries, but only that he had a right to take the quarries, so that he did not take the whole. Then I asked the learned counsel where the line was to be drawn; and whether he would keep within his right, if he left any part whatever of the stones standing, and fell short of taking the whole. No, the

learned counsel said, he was to do it in an ordinary way. It is to my mind not quite intelligible that a man has a right to destroy any subject-matter of a grant in an ordinary way, because that destruction is not an ordinary act. The taking away is not an ordinary act. It is irreparable as far as it goes. It may not destroy the whole matter, but destruction of one half is destruction just as much as destroying the whole. It is not destruction of so much, but, as far as it goes, it is as complete a destruction as the destruction of the whole. But it is said he may do it in the usual way. Then that brings us back to the question, whether there is any way usual, upon which I have already said something, and shall presently say something more. Now, I mention these things to show how utterly irreconcilable with the nature of the office the right claimed appears to be, and how little it comes within the description of the things granted; casualties, which are things accruing from time to time, and duties, which are rights, in respect of things that are not destructive of the matter. But this is destructive of the matter committed to the grantee for safe keeping, and it is most obvious how little this manner of dealing with the freehold comes within the terms of the grant. No doubt their Lordships have found, though they did not find at first, but they now all admit, that this is not a feudal right, that the grant is not feudalized; but they all in one voice admit, and your Lordships' House confirmed that finding, that there is no feudal right in the subject-matter of the grant conveyed, but all that is feudalized in this party is a right to the office of heritable park keeper—preserver for the Crown of the subject-matter assigned to him.

Now, we come to the question which is raised by the learned judges in the Court below, and upon which they have decided; and you have the weight of the authority of four most learned judges one way, and you have, I think, seven, or at all events six, the other way. We are then, not only to count the number of judges, but to weigh their reasons; and your Lordships shall hear what they say in answer to the main question, number 4, and whether or no I have been justified in stating to your Lordships that they have made a present of the fact in order to raise a question of law: “We are of opinion that, as the grant does not contain any express right to work the quarries, a right to do so can only be claimed in virtue of a usage at the date of the grant; and that it cannot be carried to any greater extent than is sanctioned by such usage.” Then when their Lordships were pressed by the argument, whether this did not go to giving a power to the keeper of the subject-matter to destroy the subject-matter altogether, for he might proceed to quarry under Holyrood House windows, “No,” say

Sept. 24, 1831.

Sept. 24, 1831.

the learned judges, "we will adject the qualification to our judgment; " we adhere to the interlocutor of the Lord Ordinary, 'in respect " no abuse is alleged to have been committed.' " Now, I want to know whether it is possible for a lawyer to understand that, except in one of two cases, either that the right was unlimited, or that the right was limited. If the right was unlimited, there can be no abuse whatever. If the right was limited, how, by possibility, can you discover in what manner their Lordships considered that the right was limited, or could be limited, unless, by adverting to the judgment, you find it there stated? The opinion, in answer to the fourth question of the four consulted judges, is that which I have already stated, that it can be carried to no greater extent than is sanctioned by usage. Does this mean usage up to the present time from the year 1646, or does it mean contemporaneous usage? Because, if it means usage since the grant, unless it be contemporaneous usage, (which is a good exposition of the doubtful meaning of a grant,) I do not comprehend how what a man has done under a grant adversely to the grantor can be said to enlarge the subject granted to him, much less can I understand it if his dealing has been very recent, as I think I shall show your Lordships that it has been. But the keeper of a park, who is in the situation of an officer under the grantor, stands in a perfectly different situation from either a grantee feudally, or a grantee even for a very long term of years, or for a succession of lives; at all events he stands in a perfectly different situation from a feudal grantee, a vassal under the grantor, or of a person to whom there has been an absolute alienation. A park-keeper stands in a perfectly different situation, because a park-keeper may be allowed to do a number of things by his master without thereby acquiring a right. The Crown is his principal, and he is merely its agent to keep the park. Suppose there had been a connivance on the part of the Crown, from favour to him, allowing him to take this stone, it does not follow that his right is thereby established, as in the case of an adverse enjoyment by one person against another, the first-mentioned person being the vendee, and the last-mentioned person being the vendor. The relation of the two parties would materially alter the import and effect of that language, even if that existed in fact, which I shall presently show does not. Then comes this remarkable passage, which is the corner-stone of the opinion of these learned persons, and to which, therefore, I solicit once and again particular attention:—"We think " there is evidence in process that the keeper of the park has been " in use, from the date of the grant, to quarry and sell, or to permit others for his behoof to quarry and sell, stones for the purpose " of causewaying the streets of Edinburgh, and perhaps for some

Sept. 24, 1831.

“ other purposes in the city and neighbourhood.” Now, this expression “ perhaps ” was just one of the things in this singular but important passage which first excited my attention, and made me suspect the inaccuracy of the whole ; because to say there is evidence in process of a certain fact, I can understand, and upon reading that expression I should never have doubted that I should find the fact in the process ; but to say there is evidence of that fact, and “ perhaps ” of another fact, I cannot understand, because either there is evidence of it or there is not. There can be no “ perhaps ” about it, unless they mean to say that the evidence is of a very doubtful nature, and that it is possible it may go farther than that, which it can be strictly taken to prove, whether it is confined to causewaying the streets or to some other purposes ; but there is no doubt of that, because it is easy to see if there is any other purpose mentioned. How, therefore, can these words that come under the “ perhaps ” have any accurate place in the opinion ? But passing this by, I have looked into the whole process, and I have not found any evidence ; I have called upon the learned counsel for the respondent to show the evidence of this, and they have referred me to something, but I apprehend to nothing which can be called evidence of any such fact ; and I pray of your Lordships to see how these very learned lawyers assume the fact in order to get at the point of law. They say, “ We think there is evidence in “ process ; ” that is to say, documentary evidence, because that which in the Scotch law is called evidence in process is a perfectly well known and technical phrase, and it means some document in the process legitimately proved, and in the possession of the Court. Now, where are the documents which, even according to the laxity of the Scotch practice in matters of evidence, prove this following proposition, that the keeper, of a park—nobody else—(for if it were any body else it would avail nothing) has been in use from the date of the grant of 1646 to quarry and sell, or to permit others to quarry and sell for his behoof ? I will tell your Lordships what that means ; if this finding was correct there ought to have been legal evidence in process, receipts from different park-keepers or their stewards, now dead, charging themselves with the receipt of monies from different individuals who had leave to quarry and take away stones from Holyrood House Park. That is the sort of evidence which, to an English lawyer’s mind, is described by these words ; or else depositions perpetuated, which have become evidence of persons who, of their own knowledge, stated that different persons had at different times actually applied for and obtained leave to quarry from the park-keeper, and had paid to the park-keeper and his agents monies or other considerations for that leave so obtained.

Sept. 24, 1831. a hundred years before, in June 1554; it is, that "the magistrates
" and council, at the request of Mary, the Queen Dowager and

airs or assignees, or to his factors in his name, yearly and ilk year during the space of this present tack, the soume of four thousand ane hundredth twenty-five merks Scots money, at two terms in the year, Lambas and Candlemas, by equal portions, &c. And sicklike, the said David Smith obliges him and his foresaids, that neither he nor any other, by their order or knowledge, shall not plow up any part of the said park, nor cast any faile or divotts, or winn any stones for building (except causeway stones), in any part thereof, except what sall be necessary for repairing the saids houses during this present tack; and they shall flit and remove themselves, their families, subtenants, &c. &c.

At Edinburgh, the 12th April 1717.—Which day the honourable the magistrats and council of the city of Edinburgh being assembled, the council, with the extraordinary deacons, authorized and empowered Robert Wightman, present treasurer, to agree with David Smith, tacksman of the King's park, for liberty to dig for caler stanes, and carrieing the same off for the good town's use, for such an number of years, and for such an yearly rent as he can best agree, whercanent thir presents shall be a warrand.

It is contracted, agreed, and ended betwixt Mr. Charles St. Clair of Hermiston, advocate, as commissioner for Thomas Earl of Haddington, heritable proprietor of the lands and others under written, conform to a commission and factory granted to him, dated the day of on the one part, and George Knox, second lawful son to Archibald Knox of Mayshiell, on the other part, as follows;—that is to say, the said Mr. Charles St. Clair, as commissioner foresaid, sets, and in tack and assedation, for the yearly rent and tack-duty under written, lets to the said George Knox and his heirs allenary, secluding assignees and subtenants, all and hail the park of Holyroodhouse, with the grass and pasturage thereof, houses, biggings, yark meadows, parts, pendicles, and hail pertinent thereof, as the same were last possessed by David Smith, late tacksman thereof, lying within the sheriffdom of Edinburgh, and that for all the days, years, and space of twenty-one years next and immediately following his entry thereto, which is hereby declared to have been and begun to the arable land at the term of Martinmas last, and to be and begin to the houses, grass and pasturage at the term of Candlemas next, and to the working of the quarries upon the 1st day of April next, and from thenceforth to continue and endure to be peaceably possessed and enjoyed by the said George Knox and his foresaids during all the years of this present tack, which the said Thomas Earl of Hadinton, his heirs and successors, are hereby bound and obliged to warrand to the said George Knox and his aforesaids at all hands, and against all deadly, as law will; for the which causes and on the other part, the said George Knox as principal, and the said Archibald Knox of Mayshiell, his father, as cautioner and surety for and with him, bind and oblige them, conjunctly and severally, their heirs, executors, and successors whatsoever, to make a good and thankful payment to the said Thomas Earl of Hadinton, his heirs and assignees, of the sum of two hundred and fifty pounds sterling yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions. And it is hereby agreed to by both parties that the said George Knox and his foresaids shall have liberty to open and work stone quarries and causeway stones in any part of the grounds of the said lands, and to sell and dispose upon the stones workt by them out of the same at their pleasure, &c. &c. And, lastly, it is hereby communed and agreed upon

“ Regent of the realm, consented to build, at their own expense, Sept. 24, 1831.
 “ the whole slopes in the park-dyke round about Arthur’s Seat,

by both the saids parties, that the persons to whom the quarries now going upon the saids lands are presently let shall have the liberty of carrying off what stones are already wrought by them, or shall be wrought by them before the said George Knox his entry thereto, till the first day of April next to come, &c.

At Edinburgh, the 22d February 1764.—Which day the right honourable the lord provost, magistrates, and council of the city of Edinburgh being assembled, anent the memorial given in for Andrew St. Clair, merchant in Edinburgh, setting furth, that the memorialist, Mr. St. Clair, was tacksman of the stone quarry in the King’s park, and thereby had occasion to carry on a very extensive work, for which purpose he has a great number of hands daily employed in making causeway stones for pavement. As the good town has frequent occasion for such stones for paving the streets and avenues, the memorialist apprehended it would be for the advantage of the good town, as well as for him, if they could agree upon terms for the memorialist’s furnishing the town from time to time, during the continuance of his lease, with such stones as they have a demand for, and with this view Mr. St. Clair offered the following conditions:—That the memorialist should become bound to supply the good town with whatever quantity of dressed or undressed stones they might require during his lease at or till the day of April one thousand seven hundred and seventy, at the following rates, viz. best dressed stones at eight shillings and sixpence per ton, and undressed stones at one shilling and eight-pence per cart, each cart containing 12 cwt., both to be delivered without further charge anywhere within the libertys of the town as occasion requires, and to oblige himself to free and relieve the town of the sum of twenty pounds sterling, which they at present pay annually to the tacksman of the King’s park for the liberty and privilege of working stones there. On the other hand, it is proposed that the town council become bound to take all the stones they have occasion for, for the use of the city and liberties, from the memorialist, during such space as shall be agreed upon, and not to supply themselves with stones any where else without the consent of the memorialist, and to pay at the prices stipulated for such stones as are furnished once in the year. Lastly, that the workmen employed by the town may not be thrown idle, the memorialist proposed to engage and become bound to employ such of them in his service as are experienced in such work, while they continue to work to the satisfaction of the memorialist’s overseer, and to allow them such wages as they give their other workmen. If these terms were agreeable to the council, it was proposed that a contract be entered into betwixt them and the memorialist upon stamp paper, containing a penalty and other clauses requisite, as the memorial under the hand of the said Andrew St. Clair bears. Which being read in council, the same was remitted to Bailie Hamilton and his committee, and they to report. Accordingly the following report was this day given in; viz. the committee subscribing, to whom the memorial of Andrew St. Clair, merchant in Edinburgh, offering to contract for furnishing the city with causeway stones, and a proposal by Robert Campbell, merchant in Stirling, to the same purpose, were remitted,—report that they had taken pains to compute the cost of the causeway stones for some years past, and find that it has never been less than eight shillings and sixpence per ton for drest stones, and three shillings three-pence one fourth per ton for undrest stones, besides tear and wear of quarry-graith, &c. That, upon inquiry, they likewise find the stones of the rock in the King’s park have by experience been

Sept. 24, 1831. “ Salisbury and Duddingstoun Craigs, under protestation that the
 “ same do not prejudice them in respect of the calsey stones which
 “ they were used to get out of the said craigs when they had to do
 “ therewith ;” that is, when they had occasion. Now this is only that
 they, in undertaking to build upon a certain spot, protested that
 they should still have a right to stones for their use. But I need
 hardly tell your Lordships that this is no evidence at all; even if
 the town council were the party, instead of the park-keeper, it
 would be no evidence, because an entry in a book of any man’s
 predecessors is no evidence for the man who claims under him.

found the best in every respect; and as they cannot see how Mr. Campbell could provide the town with these stones, were of opinion, that if Mr. St. Clair will undertake to furnish them in terms of his said memorial, viz. drest stones, that is, equal to the best causeway stones that have been used in paving the streets of Edinburgh, at seven shillings per ton, of such size and dimensions as the town’s overseer shall require from time to time, and rough or undrest at one shilling and sixpence per cart, each cart containing twelve hundred weight, the price at which Mr. Campbell offers to furnish them, the town council should enter into a contract with Mr. St. Clair for that purpose, he, as offered in his memorial, taking off the town’s hands Knox’s tack, and paying the rent from Candlemas last, and purchasing the town’s quarry-graith and tools at a valuation, and also engaging to employ all the town’s layers, hewers, and dressers, except when the town has occasion to employ the layers in paving the streets, the town treasurer to pay annually at Whitsunday for what stones are furnished, beginning the first term’s payment at Whitsunday one thousand seven hundred and sixty-five, as the report under the hands of the said committee bears. Which being considered by the magistrates and council, they, with the extraordinary deacons, approved of the said report, and authorize Bailie Walter Hamilton to enter into a contract with the said Andrew St. Clair accordingly, containing a clause for a mutual break at the end of three years; with a proviso, that the city shall have the use of the stones already quarried without any payment, and also such old stones as may be lifted, and again employed when causewaying the streets.—Extracted from the council records, &c.

It is contracted, agreed, and ended betwixt Thomas Earl of Hadinton, heritable proprietor of the lands under written, on the one part, and George Knox, tenant in Holyroodhouse Park, on the other part, as follows; that is to say, the said Thomas Earl of Hadinton hath set, and by these presents, in tack and assedation, for the yearly rent and tack-duty under written, lets to the said George Knox and his heirs allenarly, excluding assignees and sub-tenants, all and whole the park of Holyroodhouse, with the grass and pasturage thereof, houses, biggings, yards, parts, pendels, and pertinents of the same, (excepting hereof the whole stone and sand quarries, and the houses belonging to them in the said park, with free ish and entry thereto, which the said earl reserves for himself, or to set to others,) all presently possess by the said George Knox, &c.; and that for the space of three years next and immediately following his entry thereto, which is hereby declared to have been and begun to the houses, yards, grass, and pasturage at the thirteen day of February last one thousand seven hundred and seventy-one years, notwithstanding the date hereof.—Rent, 400*l.* sterling.

Sept. 24 1831.

It only shows that ninety years before the date of the grant in question the town council—not the park-keeper, but the town council—pretended to have a right to take stones; that is all it amounts to. It proves nothing in respect to the park-keeper; it is not even evidence to prove any thing respecting the town council. Then it is stated, that the same practice is further proved in 1599, about fifty years afterwards: “The same day appeared John Robertson, flesher and tacksman to the King, of his Majesty’s park, and was content and consented that the town shall have their calsey stones forth of the same, not hurting his corn, grass, or goods, and repairing the skaith in case any be sustained.” Now every lawyer knows this, that if my tacksman or tenant consents to do a thing, that gives no right to any body against me, unless it is proved that he told me; you must prove that I knew of it. But all that is said is that the tacksman was consenting, and there is nothing about the park-keeper. I am supposing now that this would be evidence of his consent, which it would not, because an entry in the council books is no evidence of the man having come there to consent. Those two entries are prior to the date of the original grant of the office. Then, we come to 1664, the period after the grant, when there was a park-keeper: “On the 28th of October 1664 there is the following entry in the council records: ‘Appoints the treasurer to agree with the layers of the calsey for winning of calsey stones out of the park, for the service of the town’s common calseys, of such square and thickness as shall be prescribed to them.’” That is an entry of the council appointing them to agree with the layers of the causeway, (that is to say, the paviers of Edinburgh,) for winning stones out of the park, and that is no evidence at all. Then comes, in 1688, this entry: “The council grants warrant to the treasurer to agree with any person for winning of stones in the park for the use of the calsey.” Now, that is no evidence; but if it were, it does not prove that the town-council claimed a right in those days to take stones from the park. No doubt my opinion is, that, upon the whole, there is reason to believe that from time to time the Crown has given leave to the town to procure stones for paving out of the park, as lying handy to the town; but then it was only through favour. Then, my Lords, the first entry in which the keeper is introduced is about thirty years after the date of the grant, namely, in 1675. How far a usage which begins thirty years after the grant, that is to say, when both the grantor and the grantee are removed,—how far that amounts to contemporaneous usage, which is to be considered as expository of a doubtful usage, I leave your Lordships to judge, even if it were usage; but I shall show you

Sept. 24, 1831. that it is not even the shadow of usage. It is like any thing rather than what the learned judges describe it to be. The entry is dated the 3d of December 1675, and it says, "The council recommends "to Bailie Hay the treasurer, and Deacon Hamilton, to speak with "Sir James," that is the park-keeper, "that in setting of the King's "park there be liberty reserved to the good town to win stones, "and lead the same from the said work, for helping and making the "public calseys." Now, what does this amount to? That when he is making a lease of the park, as park-keeper to the King, he shall take care to reserve — what? Not a right to quarry and take stones, but leave to go over the surface in spite of the tacksman — without which reservation it would be a trespass — and do what? Exercise the right which they claimed before? It is not that. Did they desire the bailies to speak to the park-keeper to give them leave to take stones? That would have looked somewhat like asking leave of the park-keeper, though I should still say that I thought it very doubtful evidence, for it might not have been the park-keeper as representing his master, the Crown. But it is not so; it is, that he should reserve leave to go over the demised park, and in spite of the rights of the tacksman under that demise, that they shall not be held trespassers in going over it to work at the quarry, for the purpose of taking what they pretend they had a right to take, and which they did not at all ask the park-keeper for leave to take, namely, to quarry there for stone. Then, on the 15th of that month, comes this entry: "The same day report was made by Bailie Hay, that "he having met with Sir James Hamilton," that is, the keeper of the park, "concerning a liberty to be reserved for the town, to win "calsey stones out of the King's park, which the said Sir James "Hamilton most willingly condescended to, that the town should "have that liberty, with this provision and declaration, that if, in "the winning of stones and carrying them off the ground, there "be any prejudice done to his tacksman, that, as for that damage, "he was willing that the town should take two persons, and his "tacksman other two, to whom the liquidation of the damage is "to be referred to their discretion." Now, what is this? It is not that Sir James Hamilton gave them a right to quarry. If it had been so, it might have been said to be the exercise of an act of ownership as to the quarry, though still it might be better referred to his office as park-keeper. But it is not that; it is no exercise of that right by him; he gives no leave to take the stones; they only say, that he condescends to their request of reserving, as against his tacksman, a right for them to go over the grass, they paying reasonable damage for any injury they may do to the same. It is not a right to quarry. He does not say a word about that,

but he gives them power to go over the grass ; and if they spoil the pasture, they are to pay the tacksman for the damage. Now, is this any thing approaching to the usor of a right, or the claim of a right, or even the mention of a right ? Is there any thing even mentioned about the right to take stones out of the quarry ? It is quite another thing. Then there is a subsequent entry, by which it appears that payment was actually made by the town for paving-stones which they received. Now this is, no doubt, what the learned judges mean when they say that there is evidence in process of the park-keeper quarrying, or permitting others to quarry for his behoof, and they besides think they have got strict legal evidence of his receiving money for the leave to quarry. But I will show your Lordships what that supposed evidence is. It is an entry of the 19th of March 1680 in the books of the town, not of the park-keeper : “ The said day the council appoints Magnus Prince, town treasurer, to pay to the relict of Alexander Todrig, keeper of the King’s park, the sum of 40*l*. Scots money, and that for two thousand and five hundred calsey stones, at 16*l*. Scots per thousand, furnished by the said deceased Alexander Todrig to the good town, according to a particular account, whereof these presents shall be a warrant.” Now, this is not only no evidence what ever to prove the fact of the payment, but it is not admissible. No judge is allowed by the law of the land to look at that document. It is not evidence to prove the fact. If they had found an entry in a book by the park-keeper himself, or his bailiff or steward or other agent, charging himself with the receipt of 40*l*., and stating that the 40*l*. was received as a consideration for so many thousand calsey stones, that would have been strict legal evidence of the fact. But this is only an entry in the books of the person who paid the money, which by law is no evidence whatever to prove that he paid the money. My agent, or myself, entering in my books that I have paid money, is no evidence that I paid it. If I enter that I have received money, that charges me with receiving it ; but this is a man’s entry in his own books, used by the learned judges as what they call “ evidence in process ” to prove the receipt of money ; so that, if A’s book is found, saying that he paid over to B, it is to be set up by B as evidence that he received money. But, marvellous to tell, it does not even purport that the money was paid ; it does not say a word about the money being paid. It is, “ The said day the council appoints Magnus Prince, town treasurer, to pay to the relict of Alexander Todrig ” certain sums of money ; but non constat that Magnus Prince did pay. Magnus Prince, like many other magni principes, may not have paid. He may have got the money to pay, and never paid it over to any body. It is only an order

Sept. 24, 1831.

Sept. 24, 1831.

that he should pay, and it does not even prove that they who gave the order issued the money to pay; but, supposing that they had issued the money as well as the order, it is not proved that Prince did pay it; and, if it were entered that he had paid it, still it would be no evidence that it was received. Yet this is what they call "evidence in process," and it is just as good as the rest. Then comes an entry on the 20th of January 1697:—"The same day
 " the council, upon the treasurer's report that he had appointed
 " several persons to furnish calsey stones, which are now ready to
 " be carried out of the King's park, do therefore appoint the treasurer to advance money for that use and to cause carry the said
 " stones to any convenient place for the use of the good town,
 " whereunto the presents shall be a warrant." Now, what is that? It has nothing to do with the quarrying; it is for taking the stones away. Then we come to 1711, and that is a lease from Lord Haddington to David Smith, in which David Smith "obliges
 " him and his foresaids, that neither he, nor any other by their
 " order or knowledge, shall plough up any part of the said
 " park, nor cast any fail or divotts, or winn any stones for building
 " (except causeway stones), in any part thereof, except what shall
 " be necessary for repairing the said houses during the present
 " tack." Then comes, in the year 1717, the following entry in the records:—"The Council authorized and empowered Robert Wight-
 " man, present treasurer, to agree with David Smith, tacksman of
 " the King's park, for liberty to dig for calsey stones, and carrying
 " the same off for the good town's use, for such a number of
 " years and for such a yearly rent as he can best agree, whereunto
 " these presents shall be a warrant." Now this only proves, according to the effect of the observation I have already made, that the town did agree with the tacksman for liberty to dig causeway stones, and carry them off for the use of the town. Your Lordships have seen before that the town did not ask leave to dig; but it appears here that they asked leave to carry off what they had quarried, which they would not have had a right to do without the leave of the tacksman. But at all events the reservation of David Smith, bargaining that he should not win any stones, is merely an acknowledgment of a man's tenant made to himself, by a private instrument between them, behind the back of the over-landlord, the Crown, by which the tenant agrees not to take the stones. Does that vest the right of the stones in the landlord? No such thing;—any thing but that. There is, my Lords, a class of evidence which is very frequently resorted to in courts of law, and which does not, perhaps, prove much; but still it is competent proof, and always goes for something. In cases where one party or

another is entitled to minerals under the ground, or to certain rights of cutting timber, it is a common thing to produce leases from various lessors in succession to various tenants by which they convey those rights for a consideration; and if there is proof that that consideration has been paid by those tenants to those lessors, that is held to be evidence. It is never very strong evidence perhaps; but it is held, in the absence of other proof, to be enough, when there is no counter-evidence, and nothing repugnant in the nature of the right of the landlord;—it is held to be a sort of proof, upon the ground that no person would pay for what was worth nothing. It is a sort of admission of those persons, against their own interest, that there was something purchased. But then in all these cases there is a consideration, and the whole value of the evidence (without which it has no weight whatever, not so much as dust in the balance,) arises from a consideration having been paid, or at all events agreed to be paid, by those lessees. But here David Smith, the lessee, makes no such agreement; here the party leasing stipulates nothing. David Smith pays no rent for taking the stones, he receives no abatement of rent for not taking the stones, but all he does is to covenant that he shall not take those stones, except in a particular way. Now come one or two other cases in which the rent of 250*l.* is mentioned. In the year 1748 there is a lease “at the rent of 250*l.*, for the period of twenty-one “years immediately following the entry of the tenant, which entry “is declared by the lease to have been and begun to the arable “land at the term of Martinmas last 1748, and to be and begin “to the houses, grass, and pasturage at the term of Candlemas “next, and to the working of the quarries upon the first day of “April next.” Then, that lease being merely a bargain between the parties, the question is, whether there is any evidence in the cause that it was fulfilled by the actual payment of the rent? But here it is said, “There is a book produced (I suppose in “process) kept by that individual,”—that is to say, George Knox the tenant, not the landlord,—“which has recently been recovered “from his representatives, beginning in the year 1755, and ending “in 1757, and containing accounts of the stones sold on credit from “the quarry for paving and building, and also entries of the wages “paid to the quarriers and other workmen.” Now this only shows, and it is evidence to that extent upon the principle I have already laid down, that Knox, the tenant, sold under this tack those stones for a profit. My Lords, this is the only thing like evidence which I can perceive, the only tittle of evidence to support the proposition upon which the judgment proceeds, that there is proof in the cause of the keeper of the park having permitted persons, for his behoof, to quarry and sell stones. But there is not a tittle of evidence of

Sept. 24, 1831.

Sept. 24, 1831. its being for the behoof of the park-keeper; there is only evidence that George Knox sold and received the price of some of those stones. From the loose way in which evidence is dealt with in the Court of Session, I am not sure that there is evidence of the money having actually been received; it only says that it contained an account of stones sold on credit. That would be no evidence at all. It is no evidence to charge me with a payment that a book is produced in which I say, "I sold stones for ten pounds, to be paid a year hence;" that is not admissible. If I say, I sold stones to be paid a year hence, having received 5*l.*, or having received 10*s.*, that is evidence to charge me with the receipt of 5*l.* or 10*s.*, but it is no evidence of payment that I make an entry of having sold at a credit; it is not even admissible to prove that I did sell them. Therefore I should be noways surprised, if, upon the production of that book, it were found to prove absolutely nothing. As to the entry of wages paid to the quarriers and other workmen, that, for the reason I have given, is clearly not evidence. Then we come to the memorial from Andrew Sinclair, a merchant in Edinburgh. That memorial is no evidence whatever. It states that he obliges himself to relieve the town of 20*l.* which they annually pay to the tacksman of the King's park for the liberty and privilege of working stones there: that is no evidence. Then it is said that there was a committee of the town council appointed to report, and they report that the council shall enter into a contract only upon certain terms: that is no evidence at all. This brings us to the year 1771, in which there was another lease granted by Lord Haddington to George Knox for the period of three years at an increased rent of 400*l.*, excepting quarries, in these words: "Excepting herefrom the whole stone and sand
" quarries, and the houses belonging to them in the said park, with
" free ish and entry thereto, which the said earl reserves for him-
" self or to sett to others." I need not remind your Lordships that this is no evidence whatever, except that such a lease was granted, and that such an exception was made. It is quite immaterial to this question what part he chose to let, or what he chose to reserve. Indeed his not letting the quarries might be because they were not his to let. Then the practice stated in 1777, I dare say, was considered as proving very much. In the factory account for the year 1777 of Mr. Craig, factor for the earl, there is the following entry: "25th September 1777.—Received from David Waugh, rent of
" Holyrood House Park, 460*l.*, and for quarries, 40*l.*;" and then it says, that "Waugh continued in possession and paid the same rents
" until Candlemas 1780;" and that is the whole evidence in the cause. I see nothing else, from beginning to end, to prove the proposition of the learned judges, which they say is fully proved in the cause, "that the keeper of the park has been in use, from the date

“ of the grant, (that is, from the year 1646,) to quarry and sell, or Sept. 24, 1831.
“ to permit others for his behoof to quarry and sell, stones for the
“ purpose of causewaying the streets of Edinburgh, and perhaps
“ for some other purposes in the city and neighbourhood.” My
Lords, I thought it worth while to go into this matter for the purpose of showing that it is not premature in your Lordships to reverse this decision, when you find the grounds upon which these learned judges purport to rest this judgment wholly fail in point of fact. But with respect to the thing in question—the subject-matter of this claim—I cannot help reminding your Lordships of how high a nature the right to the soil and to the sub-soil, to quarries and minerals, is held to be. Your Lordships are aware, that in our law the grant of the mines and minerals in a certain district is of itself sufficient, if followed by livery of the whole, to carry the whole freehold. If there be a feoffment of the mines and minerals of a certain district, and livery of seisin of the whole given, the whole freehold interest passes under that. My Lords, there is a nicety in our law which is different from the law of Scotland, and which makes the argument I am about to urge against that decision very much stronger. There is somewhat of a refinement in our law which does not exist in the Scotch law with respect to open and closed mines. If there shall be a lease for lives or for years, and nothing is said of mines at all, the lessee for life or for years, by the English law, may work the open mines, but he cannot open new ones. If there is the same lease, and mines are mentioned, and there are open mines, he still may work those open mines, and he cannot open new mines; but if the lease mention mines, and there is no mine open, the law is, that the lessee for life or for years may open and work all mines that he can find. The Scotch law is totally different from this. It is laid down by Mr. Erskine, and he quotes cases which fully bear out his statement, that if the vassal takes a freehold, even if all the mines and minerals are reserved, he takes the stone quarries, because they are held to be part and parcel of the soil, and to pass with the soil. It is laid down by the same learned writer that the life-renter does not take such part of the soil as quarries, by words of general conveyance, without express grant; and though any mines, coal or quarry, be already opened, unless there be express words granting the mines, coal or quarry, they do not pass either to a lessee for life or to a lessee for years. Mr. Erskine lays down and cites decisions as authority for that proposition. Now, my Lords, if this be so, does it not clearly and plainly follow that the decision of the Court of Session was well founded, which has been affirmed upon appeal in your Lordships house, and which negatives the proposition, that any right to the body of the freehold—to the substance and corpus of this park—

Sept. 24, 1831.

passed by the grant of the office of park-keeper, but that it continued in the grantor, the Crown, and did not pass by the grant, which said nothing whatever of those quarries ; because, according to this authority, if there had been tenant for life or tenant for years, the lease constituting his tenancy would have given him no right, without an express grant, to open a single mine that was not open, or even to continue to work the mines that were open, unless the right were given by express words. It is considered to remain in the lessor, and not to pass by a grant out of him, unless it is expressly mentioned. My Lords, upon these grounds it was, as I can gather from Lord Gifford's argument in this case when it was last before your Lordships, that he felt totally at a loss to conceive the ground upon which the learned judges in the Court below could conceive that the grant of the office of park-keeper, without more, constituted in the park-keeper a title to take away the whole body of that park over which he was appointed keeper.

My Lords, having had recourse to the arguments of the Court, I have looked into the way in which some of the Judges of the First Division attempt to illustrate the proposition more generally dealt with by the Judges of the Second Division, and I certainly can find nothing to satisfy me in the least, either upon the general question, if usor were out of the case, or upon the disputed fact, of which I say there is no evidence in the cause, that prior to the grant, or even contemporary with the grant, there was any usor by the grantee or his predecessors (of whom he indeed had none), to any extent whatever of the right now claimed. I have thought it necessary to trouble your Lordships, out of my respect for the Court below, with these reasons as illustrative of the grounds upon which I am about to move your Lordships to reverse this decision ; and I have thought it right also to point out the doors that are opened to irregularity by the practice of allowing averments to supply the place of proof, and permitting that to be taken as proof which is any thing and every thing rather than legal evidence.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

Appellants' Authorities.—2 Ersk. 9, 57—59; Forbes, 31st January 1822 (Fac. Col.); Facculati Lexicon, Ducange Glossarium; Lord Aboyne, 16th Nov. 1814 (Fac. Col.); Earl of Nottingham's Case, Manwood, 143; Lord Coke's Inst. 233, 536; Lear's New Forrest, 201; Earl of Haddington, 2 Wilson and Shaw, 478; 3 Ersk. 7, 12; Forbes, 29th Nov. 1827 (Fac. Col.)

Respondent's Authorities.—Stat. 1617, c. 12.

MUNDELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

EARL OF MAR, Appellant. — *Solicitor General (Cockburn)*— No. 45.
Roberston.

LADY F. J. ERSKINE and others, Respondents.—*Lord Advocate (Jeffrey)*—*Mr. John Campbell.*

Entail—Provisions to Children.—Circumstances in which, (affirming the judgment of the Court of Session) provisions to younger children granted under an entail giving power to the heirs of tailzie “to provide their “younger children to reasonable provisions,” were sustained.

THE entail of the estate and earldom of Mar contains the following clause: “And also excepting and reserving full power
 “and liberty to the said Thomas Lord Erskine and the other
 “heirs of tailzie to provide their younger children to reasonable
 “provisions; declaring always, that any bonds of provision to be
 “granted by the said Thomas Lord Erskine and the other
 “heirs of tailzie above mentioned shall be so qualified as that
 “any apprising or adjudication, or any other legal diligence to
 “be led and adduced therefrom, shall only subsist for a real
 “security for the principal sums, annual rents and expenses,
 “but that the legal reversion of said diligences shall never
 “expire.” In May 1816 John Francis Earl of Mar, then the heir in possession, executed, in virtue of this power, three bonds of provision in favour of his six younger children for 15,000*l.* sterling of capital sums, and with 700*l.* of annuities. John Francis died in August 1825, and was succeeded in the entailed estate by his eldest son John Thomas Earl of Mar, against whom the younger children of John Francis brought actions of constitution on their bonds of provision and annuity. John Thomas died in 1828 before decree, and was succeeded in the entailed estate by John Francis Miller Earl of Mar, against whom the present actions were transferred and decrees recovered in July 1829. Some time before his death Earl John Thomas executed two bonds in favour of Ladies F. J. Erskine and J. J. Erskine, his two daughters, the first for 10,000*l.* in corroboration of an obligation in his marriage contract, and the second for a provision of 20,000*l.* on the narrative of his powers under the entail, and of any other power which might be competent to him

Sept. 28, 1831.

1ST DIVISION.
 Ld. Moncrieff.

Sept. 28, 1831. under the statute 5 Geo. 4, c. 87, declaring that any sums to be received by them under his contract of marriage or the former bond should be imputed in part payment of the new bond, and the provisions were declared to be restrictable if they exceeded what was lawfully competent to the granter under the most liberal exercise of his powers to burden.

When the present earl succeeded to the estates these provisions to Earl John Francis's daughters, with arrears of interest, amounted to 24,000*l*. At the death of Earl John Thomas the gross rental of the estates was about 8,700*l*.; but the parties were at issue whether the amount of the free rental was 6,181*l*. or 6,846*l*. after deducting public burdens, the annuities, interests of the whole provisions and of the arrears for which decree had been recovered against the present earl. In these circumstances the earl raised an action of reduction of the two bonds granted by Earl John Thomas on the grounds that they were not reasonable because the estate was already burdened with provisions granted by Earl John Francis to the extent of 25,000*l*.; and the free rental was so much reduced, that there were no means of paying those granted by Earl John Thomas, except by depriving him (the present Earl) for a term of years of any beneficial interest in the estate.

In defence it was maintained, that the bonds of provision in question were expressly sanctioned by the entail; that they were not affected by the Act 5 Geo. 4, c. 87; and that, in any view, they must be supported to the extent of two years free rental. The Lord Ordinary reported the cause on cases to the Court, adding the subjoined note.* The Court (3d December 1830) † assolizied the defenders.

† 9 Shaw and Dunlop, p. 126.

* " Note.—It appears to the Lord Ordinary that this case depends, in the first instance, on a question of law, which, though of an arbitrary nature, is not properly a question of discretion; and eventually, in case the first point should be determined in favour of the pursuer, on a question of discretion, which must be decided by the Court. He is of opinion that in considering the question whether the bonds of provision are at all liable to reduction, it is the entail alone which must regulate, and that the act of parliament 5th Geo. IV. c. 87. ought to have no influence on any part of the argument; for though that act is referred to, as well as the entail, in the latest of the two bonds, evidently for the general purpose of taking the chance of any advantage it might possibly afford, yet as the act in the 12th section reserves, in the most unqualified terms, all powers already granted by any existing

Sept. 28, 1831.

The Earl of Mar appealed.

Appellant.—1. In determining upon the validity of the bonds of provisions in question, it was essentially necessary that the

“ entail, and as it is clear in point of fact that the defenders in this case do not and
“ cannot maintain any enlargement of the power by the statute, the Lord Ordinary
“ thinks that their case must be judged of, on the power reserved by the entail, in
“ the same manner as if it had arisen before the act of the 5th Geo. IV. was passed.
“ The just construction and application of the clause in the entail cannot be affected
“ by a statute which expressly reserves the full force of it, and which was intended
“ for cases where either no power, or a less power than that given, was reserved by
“ the entail.

“ The entail gives power to the heirs of tailzie ‘ to provide their younger children
“ to reasonable provisions.’ In this case the last Earl of Mar has exercised the
“ power in all due form, and he was the only person whose act or consent was
“ required, either for making the provisions at all, or for fixing the amount of them
“ in the first instance. The question is, whether his deed is liable to reduction, on
“ the ground that the provisions expressed in it are not reasonable. This is evidently
“ not a simple question of discretion, nor at all the same question which would arise,
“ as in the case of *Roths*, if some express condition in the entail had been omitted,
“ or unduly observed, and the Court were called upon, by its own powers of equity,
“ to supply the defect, by supporting the deed to the extent of what they might think
“ reasonable provisions. In the case of *Roths* the Court, after much discussion,
“ found that a consent required by the entail had not been duly obtained, and they
“ then sustained the deed to the extent of provisions modified by themselves. But it
“ is thought that if it had been found that the consent had been duly obtained, the
“ Court would probably not have interfered with the deed actually done, though the
“ provisions exceeded what they afterwards, in the exercise of mere discretion, fixed
“ upon as suitable according to the rental at the death of the granter. Although,
“ therefore, there is no doubt that, in the present case, the terms of the entail imply
“ that if the provisions granted are unreasonable, this is a relevant ground of reduc-
“ tion to some extent; yet, before the Court can be called upon to exercise the dis-
“ cretionary power of determining what would be reasonable, it must be made out
“ clearly by the pursuer that there is such a palpable excess as to render it the duty
“ of the Court to set aside the legal act of the party to whom the discretionary power
“ was in the first instance committed. But it is possible to determine that a given
“ sum is excessive, without previously fixing an absolute measure of what would be
“ reasonable, or not excessive.

“ This is necessarily an arbitrary question. To resolve it, all circumstances must
“ be considered,—the rental, the existing burdens, the condition of the heir, and the
“ condition of the daughters of such a family. The pursuer rests his argument very
“ much on the rules of the act 5th Geo. 4, as affording a guide in this matter. The
“ Lord Ordinary humbly thinks that those rules ought to have no influence on the
“ question. If they were admitted, the consequence would be, that the defenders
“ would receive no provisions at all, because the provisions made by the former Earl
“ are not paid off, and they amount to, or rather exceed considerably, the whole
“ amount permitted by the statute; and the Lord Ordinary cannot think that when

Sept. 28, 1891,

Court should decide, in terminis, how far the provisions are effectual under the statute in virtue of which, as well as the powers reserved by the entail, they expressly purport to have

“ the Court sustained those provisions, amounting to 25,200*l.* as made under this
 “ entail, it could be the meaning that the Earl then in possession, having two daugh-
 “ ters grown to women's estate, should, in the event which happened of his dying
 “ before it was possible to pay off these previous provisions, have no power to provide
 “ a shilling to these daughters. The pursuer does not maintain this; and it would
 “ be the more difficult to maintain it, because, to the extent of 10,000*l.* the bond
 “ executed by the Earl after his succession was in implement of an onerous obligation
 “ long before undertaken by marriage contract.

“ The question then is, whether the provision of 10,000*l.* to each of the daughters
 “ is, on general principles, so plainly unreasonable, that it must be set aside as not
 “ warranted by the entail? The gross rental of the estate is agreed upon at 8,742*l.*,
 “ subject to some questions by which it may be increased or diminished to the extent
 “ of a few hundred pounds. After all deductions, including annuities, taken simply
 “ at their yearly amount, and the interest of former provisions, but without deducting
 “ the expense of management, the rental is 6,683*l.*, which will be increased to the
 “ extent of about 194*l.* if it should be found that the annuities ought to be valued.
 “ If the provisions of the defenders be sustained, there will be an additional burden
 “ thrown on the pursuer to the extent of the interest of 20,000*l.* annually, and his
 “ free rental will then amount to about 5,600*l.*, subject to increase or diminution,
 “ according as the points referred to in the notes to the rental may be judged of.
 “ But there was also an arrear of 1,400*l.* of interest and annuities due at the death of
 “ the last Earl.

“ The heir in possession is not subject to a personal obligation for payment of the
 “ principal of the provisions. But it is strongly urged by him that adjudications may
 “ be led, whereby he might be deprived of possession of the estate for a length of time;
 “ to which it is answered, that as the bonds of provision afford complete securities, he
 “ could easily raise the money on assignments of the bonds.

“ In this state of the case, the Lord Ordinary thinks that the question is attended
 “ with difficulty. On the one hand, the burden is heavy upon the heir, arising from
 “ two sets of provisions coming into operation at one time; and his condition as Earl
 “ of Mar must be considered. But, on the other, it would be unjust that the de-
 “ fenders should be left without proper provisions; and their condition as the daugh-
 “ ters of the Earl of Mar must also be taken into consideration. The interest of the
 “ provisions, as they stand, taken at four per cent., will only yield an income of 400*l.*
 “ to each, and they were both unmarried at their father's death. The question is,
 “ whether such provisions are, in the circumstances of the case, so plainly excessive
 “ and unreasonable as to call for reduction. The Lord Ordinary has only further to
 “ observe, that when the Court, in the simple exercise of equitable discretion, in the
 “ case of *Roths*, sustained the bonds to the extent of a provision of 6,000*l.* to the
 “ daughter, (though she had succeeded to a separate sum of 3,000*l.*,) and an annuity
 “ of 800*l.* to the widow, the heir, who was also an Earl, was left in a much worse
 “ condition, even making allowance for his minority, than the pursuer in the present
 “ case would be, if the provisions should stand; and if they shall be reduced to any
 “ considerable extent, one of the defenders, who is still unmarried, would not possess
 “ the means of living with any decent respectability in her proper rank and condition.”

been granted. 2. The terms of the entail of Mar necessarily imply, that if the provisions granted to younger children are unreasonable, it shall be competent for the Court to give relief to the heir in possession. 3. The clause of the entail of Mar, empowering the successive heirs of entail to make provisions in favour of their younger children, implies, that no particular heir of the series shall be entitled to burden the estate to an extent, as has been done by the late earl, which renders it practically impossible for any succeeding heir to avail himself of that privilege in favour of his own family. Sept. 28, 1813.

Lord Chancellor.—My Lords, in this case there is no occasion to hear the counsel for the respondents. I move your Lordships that the interlocutor be affirmed, with 200*l.* costs. It is really burning day-light to be arguing such questions in your Lordships house. I do trust that learned counsel will exercise a little discretion in signing appeals to this house. The point has been very ingeniously put by the learned counsel who has been heard at your Lordships bar, but there really is nothing at all in the case.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—Lady Lamington, 14th Feb. 1682 (M. 8,240); Lady Preston, 13th July 1677 (M. 8243); Belchier, 30th June 1779 (M. 15,683); 5 Geo. 4. c. 87.

Respondents' Authorities.—Roths, 29th Jan. 1829) (S & D. 7.

MUNDELL—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

No. 46. JOHN HUNTER, Appellant.—*Mr. Murray—Mr. Sandford.*

GEORGE GARDNER, Respondent.—*Dr. Lushington—
Mr. Anderson.*

Cessio Bonorum.—Objections in a process of cessio,—That the certificate of imprisonment only bore from the 14th of one month to the 14th of another, but did not state if the pursuer had remained in prison in the interval; that all the creditors had not been called; and that the pursuer had from time to time varied the amount of his debts; repelled (affirming the judgment of the Court of Session).

Sept. 28, 1831.
2D DIVISION.

GEORGE GARDNER, comptroller general of the customs for Scotland, having from various causes become involved in his circumstances, he called, in April 1830, a meeting of his creditors, and laid before them a state of his affairs, showing that his funds amounted to 700*l.*, and his debts to 2,080*l.*, besides an annuity to his sisters of 75*l.*, on which no valuation was put. His income was about 580*l.* per annum. With a view to liquidate his debts, he offered to convey to a trustee, for behoof of his creditors, his whole effects, and also to assign whatever part of his salary should be thought reasonable. Ultimately all his creditors, except John Hunter, creditor for about 200*l.*, agreed that they should accept 300*l.* per annum out of his income, the sisters to draw a proportion effecting to their annuities. As Hunter persisted in dissenting, Gardner who had been imprisoned, but had been liberated, had recourse to the benefit of the process of cessio bonorum.

Hunter in limine objected—1. The certificate of imprisonment only bears that the pursuer was imprisoned on the 14th of May 1830, and was in custody on the 14th of June following, when the certificate was granted; but there was no evidence that he was not at liberty during some part of the intervening period, and all the creditors have not been called. He farther pleaded the merits, that the pursuer had from time to time varied the amount of his debts in a very unsatisfactory and suspicious manner.

Answered—1. The pursuer was in gaol during the whole statutory period, and the certificate is in the usual terms. 2. This objection was formerly urged, and the pursuer called the cre-

ditors omitted, by a supplementary summons. The same objection by Hunter, an opposing creditor formerly cited, is incompetent. 3. On the merits the variation in the state of the debts is satisfactorily accounted for. The objecting creditor has in view, by his opposition, to concuss the other creditors to pay his debt, in order that they may, for their own safety, keep the respondent from going again to gaol. If he be a second time imprisoned he will lose his situation, and the creditors will be deprived of any chance of payment.

The Court (8th March 1831) found the pursuer entitled to the benefit thereof; ordained him to grant a disposition of his effects, and to convey and assign, *habili modo*, a proportion of his salary amounting to 300*l.* sterling yearly, as proposed, to his creditors or their trustee, to be applied towards payment *pro tanto* of his debts, and to give his oath in terms of the Act of Sederunt, &c., and afterwards (10th March 1831) decerned in the *cessio*.

Hunter appealed.

Appellant.—Besides the objections raised in the Court below, the appellant is, at all events, entitled to a disclosure of the respondent's affairs much fuller than any that has been yet made, and to exhibition of every document connected with the subject.

Respondent.—The appellant has obtained every information he was entitled to. This opposition of the appellant is vexatious and oppressive, and is maintained in direct contradiction to the wishes and the interests of the other creditors.

Lord Chancellor.—My Lords, I will trouble your Lordships with a few observations on this case, feeling it to be desirable that it may be disposed of now without subjecting the parties to the expense (which probably some of them can ill afford—the one party being an insolvent, and the other a creditor of the insolvent estate) of another attendance at your Lordships' bar. There is one point upon which chiefly I have entertained some doubts in the course of this argument, and on which I do not see my way very clearly at present, in adopting the view taken in the interlocutor of the Court below. As to the first point, namely, that of the imprisonment

Sept. 28, 1831. being colourable, it is out of Court ; and as to the question of fraud, that does not appear to me to be raised in a sufficiently competent and distinct form in the Court below to enable the parties to avail themselves of the objection. I may also state, that if there is any particular branch of the jurisdiction of the Court below which ought not to be rashly made the subject of appeal to your Lordships, it is that of awarding the cessio bonorum ; this matter is intended to be for the consideration of the Court below ; the Court below is to examine the pursuer—to have the advantage of hearing all that can be urged on the opposite sides of the bar—to be satisfied that the case is one of good faith and innocent misfortune, not coupled with extravagance ; for though there has been no fraud, yet if the insolvency has befallen the party in consequence of a degree of extravagance which may not strictly be called criminal, but which must still, in a moral point of view, be considered so much a deviation from prudence that it cannot be called innocent—that would preclude the granting a cessio bonorum. But, my Lords, the point upon which I entertain a doubt is that on which the Court have directed that he shall assign for the benefit of his creditors a considerable proportion of the profits of an office which he held, of comptroller of the customs. It appeared to me on the first view, and it seems to me still, to be perfectly clear, that if the profits of that office were attachable, if they were within the diligence legally competent to the creditor, as the granting of the benefit of the cessio discharges the person and likewise the property after acquired from liability to debts, there could be, on no principle, any pretence for holding that the Court of Session had the power to say to any one creditor, “ We think it fair that a compromise should be taken, and a
“ part only of the future profits of the office be given up for your
“ benefit and that of the rest of your fellow-sufferers under the in-
“ solvency ; you may or you may not agree to that, but we impose
“ upon you the necessity of taking either this part or none at all ; for
“ by one and the same sentence by which we discharge the insolvent,
“ we tell you that you may have a certain portion of the revenue of
“ this office in payment of the debt, but any thing beyond it you are
“ precluded from attaching.” For I take it to be clear, that no person, after such an interlocutor was pronounced, would have a right to attach, however attachable it might have been in its own nature, to the extent of one farthing beyond the sum assigned by the order of the Court. But, my Lords, all this proceeds upon the supposition that this is attachable. I do not assume that it is attachable, and then argue that the Court of Session has no right to make a partial assignment. On the contrary, I hold that the Court of Session must have considered it attachable, because they found it

Sept. 28, 1831.

the subject of assignment—because their *modus operandi* was to give, through the assignment, the benefit of a portion of it to the creditors. Then I ask, how can they take a part of it, and only a part, and exclude the creditors from their recourse against the whole of it, when they, by the very act of assigning a part of it under their sentence, assume that it is of an attachable nature, because, if it be not of an attachable nature, how should it be made the subject-matter of an assignment? Now, my Lords, in what way this is to be answered I profess not yet clearly to have discovered. There is no doubt that there are decisions which appear to have not been questioned, at all events, to have been followed in a consistent course by the Court of Session, and which assume that many things which in this country are not held to be assignable are the subject-matter of assignment in Scotland. There are several cases in which the half pay of officers, and I think the full pay of officers, and also ministers' stipends, are all made the subject of this judicial compact entered into by the Court with the creditors in this mode of extending the extraordinary remedy of the *cessio bonorum*, borrowed from the civil law, and extending it to the debtor, on such terms for the creditor as in the exercise of a sound discretion they deemed it fit to impose upon one party for the benefit of the other. That appears to be the ground of much of these cases; and the Court seem not to have scrutinized very nicely, whether, from the nature of the subject-matter, namely, the half pay or the full pay of an officer, or a minister's stipend, or, in the present case, the salary of an officer employed under government, and in the execution of an important public trust, an assignment can validly operate upon and affect those particular rights; but they have nevertheless assumed to deal with them, and have directed that a certain proportion of them shall be assigned as the condition of granting the benefit of the *cessio bonorum*. Those cases, undoubtedly, could not have occurred in this country. I may refer to the well-known case of *Flarty v. Odium*, in 3 Term Reports, 681, which, from its importance, was the subject of much discussion, it being the first case in which it was held that the half pay of an officer was not the subject of assignment, and it was followed in *Lidderdale v. the Duke of Montrose*, in 4 Term Reports, where the doctrine laid down was made the subject of further discussion, and the Court adhered to their former view that the half pay was free from attachment; so that neither is a man bound to put it into the schedule of his assets, nor does the general assignment to the provisional assignee transfer it, nor would a bargain and sale to the assignees under a commission of bankrupt pass it out of the bankrupt; it is unassignable and incapable of being affected by any of those modes of proceeding.

Sept. 28, 1831. The same doctrine was laid down with respect to the profits of a living in the case of *Archbuckle v. Cowtan*, the judgment in which has been very much considered in Westminster Hall, and like most of the judgments of that most able and learned lawyer Lord Alvanley, has given great satisfaction to the courts and to the profession. In the report of that case your Lordships will find laid down the general principle, though not perhaps worked out in these words, that all such profits as a man receives in respect of the performance of a public duty are, from their very nature, exempt from attachment, and incapable of assignment, inasmuch as it would be inconsistent with the nature of those profits that he who had not been trusted, or he who had not been employed to do the duty, should nevertheless receive the emolument and reward. Lord Alvanley quotes *Flarty v. Odlum*, and *Lidderdale v. Montrose*; and in illustrating the principle on which a parson's emoluments are not assignable, he does not confine his observations to the particular case of half-pay officers, or the case of a parson's emoluments, but he makes the observation in all its generality, as applicable to every case of a public office and the emoluments of that office. The first case in which the doctrine had been extended to half pay was a case in 1st Henry Blackstone, 627, decided by the Court of Common Pleas, the case of *Barwick v. Read*, which clearly recognizes the principle. There was a case also of *Stewart v. Tucker*, reported in the 2d volume of Sir William Blackstone's Reports, 1137, in which it was held, as to an officer's full pay, that the use of it might be assigned in equity; though in that case also the doctrine was clearly recognized that the full pay of officers was not attachable. But the distinction was taken in *Stewart v. Tucker* of the half pay being granted *pro servitio impenso*, and the duty being executed, and being no longer in *feri*; that was, however, discussed by the Court in *Flarty v. Odlum*, and the rule extends to half pay as well as full pay. In this case, as well the other case of *Archbuckle v. Cowtan*, it was perfectly clearly held by the Court, that in all such cases one man could not claim to receive by assignment or attachment emoluments which belonged to another deemed to be capable of performing the duties appended to those emoluments, but which duties could not be performed by the assignee; and there was an old case referred to in *Barwick v. Read*, and a curious case in *Dyer*, in which, so long ago as the reign of Elizabeth, the question appears to have been disposed of by a decision now undisputed, and now referred to in Westminster Hall. That was a replevin brought by a party whose goods had been distrained for a rent-charge in arrear. The party who had made the distress avowed, upon the replevin being brought, that he took the goods for rent in arrear, and set forth

Sept. 28, 1831.

his having a right to a rent-charge, which had been conferred upon him with a power of distress on the manor in question, and matters within the manor, *pro bono concilio suo impendendo*: to which there was a plea in bar by the plaintiff, not denying that the defendant had a rent-charge, nor denying that he had it upon those terms, but pleading in bar, that the defendant, the avowant, had been committed to the Tower for treason, and that while he was so incarcerated he the plaintiff had had occasion for his advice, and had endeavoured to have access to him for the benefit of his counsel, but that he could not, and therefore he alleged that the rent-charge ceased, and that the avowant had no right to distrain for the arrears. That was the answer to the avowry, and to that plea there was a demurrer, which raised the very question I am now dealing with, whether what had been given *pro concilio impendendo* was the subject of assignment?—whether its continuance did not depend upon the possibility of doing the service for which it was given? And the Court were clearly of opinion, that all such emoluments given for services done or to be done could not go to the King, and would not go to the creditor under any process—that the execution of law would not go to the assignee. My Lords, all these cases lay down this principle, which is perfectly undeniable, that neither attachment nor assignment is applicable to such a case; I am therefore not very well capable of understanding how, if this could not be assigned, it could yet be attachable. If it was attachable, then the Court had no jurisdiction to force the creditor to accept a moiety of it; if it is not attachable, then the creditor certainly has no right to complain—he could not have got any part of it without the order of the Court, and he gets something by that order. But how does it happen that the Court could assign it? It is common to the laws of both countries, on principles of public policy, to hold, that if a matter is not attachable, the Court cannot compel an assignment; yet its not being attachable is, so far as we are informed, the only ground for the decision of the Court. I am, however, ready to think there must be other grounds which I cannot discover. By authorities in the Court below it appears that they have dealt with these cases of salaries, and whole pay and half pay, and ministers' stipends, as if they were subject to the order of the Court in such cases, though not attachable, and which is the foundation of their dealing with them. Probably the only view the Courts have is, that doing the thing under authority gives something like a judicial right and claim to these emoluments, without inquiring very much as to their power to do so. But as it appears that the decisions are uniform, and that they have been unappealed from in any one

Sept. 28, 1831. instance, in such circumstances I am not prepared to advise your Lordships to disregard those decisions, though I have felt it my duty, in the presence of the gentlemen of the Scotch bar, to enter upon the question, feeling most desirous to obtain some further information from the Court below as to the manner in which the two things are to be reconciled in principle. I must however say, that as the principle on which these decisions were pronounced is not very discoverable, if it had not been a case in which such a course would be productive of hardship to the parties, I should have felt a strong inclination to recommend that this question be remitted; but as the effect, would be inconvenient, I shall not advise your Lordships so to do. Still I wish to have it understood, that if ever this question shall arise again, this decision can only be taken as an acknowledgment that all those decisions subsist unappealed from and unreversed, but that this admission is not to be considered of a nature to bind your Lordships to any opinion, as if we clearly understood the grounds on which those decisions had been made.

The House of Lords ordered, That the interlocutors complained of be affirmed.

Appellant's Authorities.—4 Ersk. 3, 26; 2 Bell's Com. p. 581; Smith, 9th March 1796 (M. 11,799); 2 Bell's Com. p. 581; Wight, 13-14th June 1814 (); 2 Dow. 377; 2 Bell, p. 594—6; England, 29th July 1777 (); Barr, 2d March 1822 (1 Shaw, 417); Davidson, 11th March 1818 (Fac. Col.); Scott, 25th January 1817 (1 Shaw, p. 363).

Respondent's Authorities.—2 Bell, p. 587—8.

BUTT—ARNOTT,—*Solicitors.*

No. 47. MEGGET and ROY, W. S., Appellants.—*Mr. Wilson.*

ALEXANDER DOUGLAS, W. S., for BRYDON and OTHERS,
Respondent.—*Mr. Rutherford.*

Process.—Circumstances in which held (affirming the judgment of the Court below) that it is incompetent for the Court of Session to review an interlocutor of the Jury Court by suspension.

Sept. 28, 1831.
1st Division.

MEGGET and ROY were agents in a jury cause between Jamieson and Main, tried in Edinburgh in January 1830; but ROY, it was alleged, was not licensed, and was not an agent in

the Jury Court. The pursuer's witnesses resided in Kelso, and on 7th December 1829 Megget and Roy wrote their correspondent there, stating, inter alia, "Jamieson must also bargain with the witnesses, and not let them have any claim on us for their expenses." The witnesses were cited by a messenger employed by the pursuer directly, and not by Megget and Roy. They arrived at Edinburgh on the 4th of January, the day prior to that for which the trial was fixed. From pressure of business the trial did not take place till the 7th of that month. Megget and Roy paid them 12*l.* to account of their expenses. The witnesses, Brydon and others, afterwards applied to the Jury Court for decree for the balance; and the Court, after hearing parties (12th February 1830), decerned against Megget and Roy for 20*l.* 10*s.* 8*d.* Thereupon Megget and Roy presented a suspension of a threatened charge, but it was refused by the Lord Ordinary on the Bills, and the Court adhered.*

Megget and Roy appealed.

Appellants.—1. Roy, not being the agent on record in the action between Jamieson and Main and others, the application against him, and the orders by the Jury Court proceeding on it as incidental to that cause, were incompetent, independently altogether of the remaining reasons, which apply equally to him and the other appellant, Megget. 2. The appellants not being parties in any cause depending before the Jury Court, it was incompetent for that Court to pronounce against them the order for payment of which they now complain. 3. The judgment of the Court of Session is erroneous in holding it to be incompetent to stay, by suspension, the diligence threatened against the appellants; and, 4. Supposing the 59 Geo. 3. to confer on the Jury Court the same powers which the Court of Session may competently exercise, the orders complained of are, even according to this view, manifestly ultra vires.

Lord Chancellor.—My Lords, in this case there can be no doubt in any person's mind—it is as clear a case as one can conceive to

* 8 Shaw and Dunlop, p. 779.

Sept. 28, 1831. arise in any court in this country. There is not a show of authority nor any foundation for assuming a power in the Court of Session to review, by bill of suspension, by advocacy, or any other form, the decision of the Jury Court in a matter of this description, any more than the Jury Court has power to over-rule the decisions of the Court of Session. In this matter, whether the Jury Court is right or wrong, the Court of Session is incompetent. Your Lordships know perfectly well, where there is a final jurisdiction conferred upon any court, though they may have made an error either in kind or degree, that is no ground for going to the Supreme Court of the country. No authority has been produced to dispose of the question here. It is quite clear that no such provision, by way of review, is given by the Act constituting the Jury Court. It is said, then there will be injustice without redress. No doubt there may be mischief, where the legislature has not provided review; there may be mischief, but it is for the legislature to rectify that. Then comes the appeal here. No doubt where the Court of Session has jurisdiction, if it has miscarried, there lies an appeal here; but if the Court of Session has no jurisdiction, then the appeal is cut off from us also. The costs of this party below amounted to 8*l.*—they were taxed in the Court below. The whole matter in dispute is 20*l.* 10*s.* 8*d.* It has been thought proper (and by professional men, who ought to know better the expense of litigation,) to bring up this trumpery matter to a Court of the last resort. That being the case, they must now be prepared, from their professional experience, to pay the expense of having raised this notable point. They would be very much surprised if any thing less than the fullest costs were given in this place; indeed they must have laid their account with that when they chose to enter this appeal. I have never seen an instance (even if the case on its merits had been one of more doubt than it is) where the appellate jurisdiction has been resorted to with less wisdom and prudence than on the present occasion. I shall therefore move your Lordships that the appeal be dismissed, and that the interlocutor appealed from be affirmed, and with 200*l.* costs, which I have no doubt will not exceed the costs to which the other party has been put; but if, on representation within a week, it shall be made to appear that the costs of the other party are less than 200*l.*, I will consider this matter, and not direct the order to be drawn up till the representation has been considered.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—Act of Sederunt, 25th Nov. 1825; 4 Ersk. 3, 8, 20; Dickson, 6th March 1816 (F.C.); Tatnell, 2d February 1827 (S. & D); 55 Geo. 3, c. 42, s. 7; 59 Geo. 3, c. 35, s. 17; Gordon, 3d Dec. 1794 (M. 16,785). Sept. 28, 1831.

Respondent's Authorities.—55 Geo. 3, c. 42 and 35; 6 Geo. 4, c. 120; Feuars and Merchants of Fraserburgh, 19th June 1707 (M. 16,712).

CRAWFURD and MEGGET—RICHARDSON and CONNELL,—
Solicitors.

DAVID CLYNE, Appellant.—*Mr. J. Campbell—Dr. Lushington.* No. 48.

ROBERT SCLATER, &c., Respondents.

Partnership—Clause.—Held (reversing the judgment of the Court of Session), that calling up payment of instalments on shares subscribed for in a joint stock company did not fall under “ordinary business,” and could not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the company.

IN 1824 a joint stock concern was formed in Edinburgh, Sept. 29, 1831.
called the “Caledonian Iron and Foundry Company;” and it was 2^D DIVISION.
proposed that their capital should be 100,000*l.* sterling, divided Ld. Fullerton.
into 4,000 shares of 25*l.* each, and that of these no subscriber
should hold more than twenty. David Clyne became an origi-
nal subscriber to the extent of twenty shares. In October 1824 a
meeting was held, and 246 individuals having obtained 3,676
shares of the stock, a committee of management was appointed,
the draft of a contract of copartnery ordered to be submitted
to counsel for revisal, a deposit of 1*l.* per share called up, and
directions given to the committee to look out for works, or
ground for the erection of works, and to purchase the same
forthwith. Clyne attended this meeting, paid his deposit on his
twenty shares, and he was thereafter nominated a member of
committee to revise the contract of copartnery, which was finally
approved in December 1825, and signed by seventy-three share-
holders; he also attended the various other meetings of the com-
pany. The contract of copartnery contains, inter alia, the fol-
lowing clauses (3d section): “For raising the said capital
“ stock, the persons contracting and hereto subscribing do each
“ of them bind and oblige themselves, their heirs and successors,

Sept. 29, 1831.

“ to advance by instalments, as herein-after provided, a sum of
“ money corresponding to the number of shares of the value afore-
“ said, annexed to their respective subscriptions. That the first in-
“ stalment shall be 1*l*. sterling per share, which shall be paid as
“ upon the 9th day of November 1824; and the remainder of the
“ said stock shall be advanced in such instalments, not exceeding
“ ten per cent. each on the amount of the said capital, and at
“ such periods, as the directors or committee of management
“ herein-after named may appoint, notice in writing of each
“ call for the instalments being always given by the manager
“ or other person acting under the said committee of manage-
“ ment to each partner, twenty-one days at least previous to
“ the day of payment; and the said sums shall bear interest at
“ the rate of five per cent. per annum, from and after the se-
“ veral periods of payment so fixed, until paid. And it is hereby
“ declared, that each and every partner failing to make pay-
“ ment of any instalment within thirty days from the day fixed
“ for making such payment, (notice in writing of the call having
“ been given as herein-before required,) it shall be in the power
“ of the committee of management, in all cases where the sum
“ advanced by such defaulter or defaulters on his, her, or their
“ share or shares or interest in the company does not amount
“ to 20*l*. sterling, to declare, as they are hereby authorized and
“ empowered to declare, the same to be forfeited to the com-
“ pany, and to sell or otherwise dispose of the share or shares
“ so declared forfeited, as they may consider most beneficial for
“ the interest of the company, and that without any pro-
“ cess of declarator or other legal proceeding whatever, but
“ simply by recording such declaration of forfeiture in the
“ minute book, to be kept by the committee of management, of
“ the proceedings of the company. But in the event of such
“ defaulter or defaulters having advanced a sum amounting to
“ 20*l*. or upwards on his, her, or their respective share or
“ shares or interest in the concern, then and in that case
“ the committee of management shall have no power of for-
“ feiture, but shall be bound to bring the said share or shares
“ to public roup and sale, on due advertisement to be given in
“ one Edinburgh and one Glasgow newspaper, once a week in
“ each, for three successive weeks prior to the day of sale, under
“ such articles and conditions of sale, and at such upset prices

“ as they shall deem expedient, with power to reduce the upset Sept. 29, 1831
“ prices, and adjourn the sale from time to time; and they
“ shall have full power and authority to convey the said share
“ or shares which shall be so sold to the purchasers, and to
“ receive and discharge the prices; the committee of manage-
“ ment being, in all such cases, bound to account for and pay
“ to the former partners, or those in their right, the surplus of
“ the price or prices received, if any, after deducting interest,
“ all charges and expenses, and whatever debts may be due by
“ said partners to the company, which are hereby declared to
“ be preferable claims against all such surplus prices, or to
“ consign or deposit the same within the Bank of Scotland,
“ Royal Bank of Scotland, British Linen Company, or other
“ chartered bank in Edinburgh; and that for behoof of and at
“ the peril of such former partners, or those in their right who
“ shall be bound to receive the same, and to discharge the
“ company accordingly.” (7th section.) “ That the business and
“ affairs of this company shall be conducted under the superin-
“ tendence of a board of directors, to consist of a chairman,
“ deputy chairman, and fifteen ordinary directors, who shall
“ form the committee of management, and shall be named and
“ elected by the company at the aforesaid stated general meet-
“ ing to be held annually, as herein-before mentioned. That
“ any five of their number shall be a quorum for ordinary
“ business, and shall have full power to purchase or sell any
“ heritable property, to feu or take in lease lands or houses
“ connected with or which may be necessary for the foundry
“ department; but declaring that the committee of manage-
“ ment only, or a majority of their number, shall have power to
“ enter into any agreement regarding the purchase or sale of
“ any heritable property, feuing or taking in lease lands, mines,
“ metals, or minerals, for the smelting department; providing
“ always, that such agreement shall not be binding on the
“ partners, unless approved of at a general meeting to be called
“ for that purpose. And it is further declared, that the com-
“ mittee of management, or the majority of their number, shall
“ have power and they are hereby authorized to nominate and
“ appoint a manager, agents, and other officers for the company,
“ and generally all clerks and servants whom they may deem
“ necessary for the business of the company, with power also to

Sept. 29, 1891. “ fix the salaries, allowances, or wages of such persons, and to
“ dismiss all or any of them whenever they may think proper.”
(16th and 17th sections.) “ That in case any legal disputes,
“ differences, or controversies shall arise or occur between this
“ company and any person or persons whomsoever, it is hereby
“ declared and specially agreed, that in all cases where the
“ company is obliged to act as pursuers, plaintiffs, or complainers,
“ the manager acting for the time, or such other person or
“ persons as the committee of management may think proper
“ to nominate and appoint, shall have full power, and they are
“ accordingly hereby not only authorized and empowered to
“ prosecute and sue all needful actions or diligence in his or
“ their own names, as attorney or attorneys for and in name
“ and behalf of the company, but also to receive and discharge,
“ and upon payment to grant acquittances for all sums of
“ money which may be found due, or ordered or awarded to
“ be paid to this company by any person or persons whomso-
“ ever, any law or practice to the contrary notwithstanding;
“ and in like manner, where any suit, action, or diligence is to
“ be raised against the company, they shall be held as lawfully
“ cited to such suits and actions; and diligence shall always be
“ held as lawfully executed against them, if such actions or
“ diligence be regularly executed against the manager for the
“ time individually, and the chairman, deputy chairman, and
“ directors, at the company’s office or principal establishment in
“ Scotland.” (41st section.) “ In regard that by reason of the
“ number of subscriptions which may be adhibited to this deed,
“ it is impossible to procure one sheet of paper, or skin of
“ vellum or parchment, large enough to contain the whole of
“ this contract, together with the subscriptions thereto, in con-
“ sequence of which it becomes necessary that various skins of
“ vellum or parchment should be joined together; while at
“ the same time there cannot be sufficient room for all the
“ parties to sign the joinings of the several skins upon which
“ these presents are written, it is therefore agreed, by the whole
“ parties hereto contracting, that the said Alexander Henderson,
“ Colonel Robert Anstruther, Joseph Gordon, Dr. William
“ M’Farlane, John Kennedy, and H. J. Williams, or any two
“ of them, shall have full power and authority to sign the
“ joinings of the said skins or sheets, upon the margin, which it

“ is hereby declared shall be as valid and effectual as if the Sept. 29, 1831.
 “ same had been subscribed by all and each of the parties
 “ hereto, any law or practice to the contrary notwithstanding.”

Clyne, on the 12th January 1826, signed one of the sheets for twenty shares. A manager and directors were appointed, and ground and a foundry purchased for carrying on the operations of the company. The speculating fever of the day speedily however abated, and comparatively few of the original subscribers came forward to sign the contract. The affairs of the company were carried on with indifferent success; various calls were made by the committee of management upon the subscribers for instalments, and in particular a call of 5*l.* per cent., then two for 10*l.*, and one for 9*l.* per cent. on the shares subscribed for. But at the several meetings at which these calls were made there were never more than seven directors present, which, though a quorum, was not an absolute majority of the committee of management. Clyne refused payment of these instalments on his twenty shares; he did not, however, express disapprobation of the proceedings, or give any intimation that he no longer held himself bound by the contract. An action was raised against him by seventy-two of the subscribers.

The Lord Ordinary (9th June 1830) issued the following interlocutor:—“ In respect that the action is brought against
 “ the defender, as the partner of a company, for performance of
 “ obligations set forth as arising under the contract of co-
 “ partnery, and is raised and insisted in by the whole of the
 “ numerous individual partners, with a comparatively very few
 “ exceptions — repels the objections to the title of the pursuers:
 “ Finds, farther, that the defender did become a party to the
 “ contract libelled, and is consequently bound by the provisions
 “ therein contained: Finds, that the contract expressly provides,
 “ ‘ that the 26th day of October 1824 shall be held, notwith-
 “ standing the dates hereof, to have been the commencement of
 “ this copartnery,’ and that the copartnery must consequently
 “ be held to have been constituted and in operation from that
 “ date: Finds, that by the said contract each member became
 “ bound to pay his subscribed share of the stock ‘ in such in-
 “ stalments not exceeding 10 per cent. each on the amount of
 “ the said capital, and at such periods as the directors or com-
 “ mittee of management herein-after named may appoint.’

Sept. 29, 1831.

“ Finds, that the sums now concluded for consist of the instal-
 “ ments of the defender’s subscribed share of the company’s
 “ stock, called for in terms of the clause libelled; and therefore
 “ repels the defences, and decerns in terms of the libel: Finds
 “ the defender liable in expenses; allows an account thereof to
 “ be given in, and remits the same to the auditor to tax, and
 “ to report.” And his lordship added the subjoined note.*

* The Lord Ordinary has formed the following opinion, on the various and complicated pleas maintained by the defender:—The company here consists of between seventy and eighty individuals, and of these nearly seventy concur in the present action. Even if it had been an action directed against a third party, for the performance of obligations contracted towards the company, this concurrence of the great body of the partners would have been sufficient to support it; but for some such equitable modification of the ordinary rule, a company, consisting of so many individuals, would be practically incapable of either asserting or defending its rights. Accordingly, the principle seems to have been expressly recognised in the case of the Shotts Iron Company against Hopkirk, in which the disclamations of the action, by “ a comparatively small number of the partners,” were disregarded. The English cases referred to by the pursuers afford instances of the adoption of a similar course, and upon the same ground, in the law of England. But there is the less room for difficulty here, as the present action is brought, not properly speaking by the company against a third party, but by the great body of the partners against one of their own number, for the performance of obligations contracted by him to his co-partners, and concludes for payment of the sums to the pursuers, ‘ or the manager ‘ of the company for behoof of the company;’ an action which appears to the Lord Ordinary to be maintainable, not only at the instance of the great body of the partners against a few recusants, but at the instance of any number of the partners, however small, as every one of them has a legal interest to insist that the articles of the contract shall be fulfilled. 2dly, The defender’s objection to the execution of the contract is inadmissible, by way of exception. The contract in process presents the appearance of a complete and formal deed, bearing the subscription of the defender, with a certain number of shares added, in his own handwriting, and that subscription is set forth in due form in the testing clause. The defender does not deny his subscription, and does not aver that it had any other object than that of attesting his accession to the contract. In these circumstances, his allegation that the sheet of parchment on which he signed was separate at the time of his signature, and his plea thence arising, form an objection to the execution at variance with the present appearance of the deed and with the testing clause, which ought to be made good in a reduction. 3dly, The circumstances of the present case do not admit of the objection, that the copartnery contemplated by the defender was substantially different from that to the support of which he is now called upon to contribute. It is true the contract provides that the capital stock of the company shall be 100,000*l.*, divisible into 4,000 shares of 25*l.* each; and such a clause might, in some supposable cases, bear the construction, that the completion of the subscription formed the condition of the contract taking effect. But that construction is inadmissible here, because the printed prospectus, referred to in the original subscription paper, signed by the defender in

The Court (11th January 1831) adhered, and found additional expenses due. * Sept. 29, 1831.

October 1824, expressly provides, that, "as soon as 2,000 shares are subscribed for, the company shall be held as constituted; and the partners shall be then called together for the purpose of adjusting the articles of partnership, electing office-bearers, and giving directions for carrying the objects of the company into effect;" because, at a general meeting of the subscribers of the 26th of October 1824, at which the defender was present, and when little more than 2,000 shares were subscribed for, directions were given to the committee to inquire after and purchase the ground and buildings necessary for carrying on the works; and at subsequent meetings, at which also the defender was present, certain purchases of ground and works actually made were approved of; and because the contract itself expressly provides, "that the 26th day of October 1824 is hereby declared, notwithstanding the dates hereof, to have been the commencement of this copartnery," &c. In these circumstances it appears to the Lord Ordinary impossible to consider the provisions as to the number of shares as a condition of the contract taking effect, or in any other light than that of a prospective declaration of the amount to which the company's stock and the number of copartners might possibly be increased. 4thly, As, by the terms of the contract, the shares are transferable, and as it contains a provision regarding the descent of the shares of deceasing members to their executors, there is no ground for holding that the copartnery was dissolved by the death or the bankruptcy of some of the individual members. 5thly, The alleged acts of mismanagement and violation of the terms of the contract by the directors, or the other individuals who took an active share in the administration of the company's affairs, however relevant they may be as grounds of action against the parties concerned, do not appear to the Lord Ordinary to afford a defence against the present action. The mismanagement of the affairs of the company, and even the violation of the terms of the contract in some particulars, do not necessarily void the contract between the whole copartners, and certainly do not authorize the defender to plead, by way of exception, his non-liability for his subscribed shares of the company's stock in an action at the instance of the great body of his copartners, who, if any injury has been sustained by the alleged acts of mismanagement and violation of the contract, are as great sufferers as himself. 6thly, The provision in the third section of the contract, empowering the directors to declare the forfeiture of the shares of the partners who shall fail to pay the instalments within a certain period, is clearly an option in favour of the company, and does not bar an action for the actual performance of the obligation by the defaulter. 7thly, There seems no good objection to the form in which the calls were made. They are to be made by the directors or the committee of management; and it is declared, by the 5th clause, "that any five of the number shall be a quorum for ordinary business." What shall be considered as "ordinary business" seems a point which admits of being determined by the practice of the company, and according to that view the calls for instalments seem to have been understood as falling under that description. Besides, the 7th clause evidently includes, as falling under the powers of a quorum, various acts which seem, to say the least, as important and extraordinary as that of calling up the instalments of the subscriptions. Lastly, The plea urged in the defender's case, that the contract bound the parties to submit all disputes to arbitration, is one which admits of being waived, and the Lord Ordinary holds it to have been waived, as it is not stated on the part of the defender in the record.

* 9 Shaw and Dunlop, p. 248.

Sept. 29, 1881.

Clyne appealed on various grounds, but it is only necessary to particularize one, viz. that the call for the instalments was not authorized, and was not made agreeable to the conditions and provisions of the contract of copartnery, calling up payment of instalments on the shares subscribed for, did not fall under "ordinary business," and therefore would not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the company.

Respondents.—The instalments sued for were duly called up by the directors in terms of the contract, and according to the true meaning and reading of the clauses of the contract relating to that point, and therefore the appellant is liable in payment of them.

Lord Chancellor.—My Lords, I should be guilty of a waste of your Lordships' valuable time, and that of the suitors, if I were to call upon the learned counsel to argue any other point than the main objection to this judgment, and on which I feel it to be my duty to advise your Lordships. It is not correct to state that where a party is indebted by a natural obligation as well as civil—of paying his debts or performing his obligation—questions of law ought not to be nicely raised when he is called upon to pay that debt or to perform that natural obligation. It is the undoubted right of the individual to maintain that the obligation is not cast upon him in the manner or to the extent contended for—that he is not liable to the process, because the debt does not lie upon him in the way in which the obligation is endeavoured to be enforced, or to the amount sought from him; and of his taking those objections, if he can sustain them, the other party unquestionably has no right to complain. Bearing in mind this general remark, the present is the simplest and clearest case, if you look at the circumstances, that can possibly come before a court of justice, of a contract between two parties. The one person calls upon the other to perform his part of the contract; and the simple question is, whether the party so calling has a right to that performance? In a word, whether the defender has contracted to do that which the pursuer calls upon him to perform? The appellant has contracted to pay a hundred per cent. on certain shares, but the company on the other hand have contracted, and he is entitled to the benefit of the stipulation, that this hundred per cent. shall be obtained from him on those shares only according to

Sept. 29, 1831.

certain rules and regulations; and the question before your Lordships simply is, whether it is according to those rules and regulations that he is now called upon to pay the two instalments of that hundred per cent. ? Now, in order to see whether it is so or not, your Lordships will be pleased shortly to look at the terms prescribed for the obtaining of those calls. I need hardly remind your Lordships that in all these joint stock transactions, (which have been in so many instances ruinous in their consequences, and, I must say, to a certain degree were dishonourable in their nature to the mercantile character of the country, five or six years back,) one of the most important parts of the contract, by which the parties bound themselves was that which related to the payments on the shares by way of call; because, though at the time it was not possible that the persons who entered into the contracts should expect that they were all to sell their shares without having paid up any portion, yet it is quite clear that every person expected that before, at all events, any large proportion, amounting to nearly the whole of those shares, should be paid up by them, they were to be made in some way or other available in one or both of two cases; they looked to the profit that they were to make by getting rid of the shares, when they bore a premium, or, they intended to retain their shares, and having paid but a moderate proportion upon them, expected to derive a large profit from the concern. Now, with regard to each of these two ways of making a profit, nothing could be more material than the mode in which the instalments on the shares were to be exigible, and accordingly in all the contracts I have seen, coming from either part of the kingdom, it has been a matter of anxious provision in what manner the calls should be made. Now, let us see how it is in this case:—"That the first instalment shall be
 " 1*l*. sterling per share, which shall be paid as upon the 9th day of
 " November 1824," that is for the expenses, " and the remainder
 " of the said stock shall be advanced in such instalments, not
 " exceeding ten per cent. each on the amount of the said capital,
 " and at such periods as the directors or committee of management
 " herein-after named may appoint," notice in writing being given. I should have said it would have been clearly an evasion of the plain intent, almost of the letter of this stipulation, which the shareholder may be said to have made by the third article, if two instalments of ten per cent., each having been ordered on the same day,—they should have been both payable also on the same day. I should have reckoned that a clear evasion of this condition, because it would have been doing that which they were not warranted by the meaning of parties to do, and doing it as it were surreptitiously and evasively, the directors being allowed only to

Sept. 29, 1831. call for one instalment of ten per cent. at a time ; this would have been calling in effect for twenty per cent., though under colour of calling for two of ten ; but the force of that observation is lessened by the time for each payment being different. I still have a considerable doubt whether that was a regular course, but I should not upon that ground advise your Lordships to reverse the judgment of the Court below. But then, my Lords, the payments are to be by instalments, fixed by “ the directors or committee of management herein-after named ;” we must look then to see in what manner the “ committee of management herein-after named ” are stated to be authorized, or rather required, to perform all their duties, and, among others, that of fixing the periods and the amount of the instalments. That is laid down in the seventh condition, out of which the question arises:—“ The business and affairs of this company shall be conducted “ under the superintendence of a board of directors, to consist of a “ chairman, deputy chairman, and fifteen ordinary directors, who “ shall form the committee of management, and shall be named and “ elected by the company at the aforesaid stated general meeting “ to be held annually, as herein-before mentioned.” Now, there is no doubt that it must have been done by the majority of those, if there had been no other regulation ; but then there comes a condition that any five of their number shall be a quorum for ordinary business ; and my observation in respect of quorum clauses generally is, that they are of strict and not of lax construction, and for this most obvious reason, that if it were not so, you enable a small number to bind the majority, you enable a few to deal as for the whole, and you take the power out of the whole body, in whom generally it ought to rest, and in whom, but for the quorum clause, it does rest ; for which reason a quorum clause, both in articles of partnership and in matters of a similar kind, must be of strict construction—“ That any five of their number shall be a quorum for ordinary “ business.” By ordinary business I understand business of inferior importance, those common transactions without the doing of which the concern could not go on, and which may be as well done by five as by nine, or by the whole seventeen. It is quite clear that it would be impossible to carry on the business of any concern, if you were obliged to procure the attendance of great numbers for every matter of minor importance, and which may be as well done by five as by a larger number. But then it is said (and upon this an argument at the bar in support of the judgment below has been raised), that what follows is to be the only limitation of the business, and the only exception, and that the words “ ordinary business ” are to be either rejected altogether or to be qualified by the words which follow, and that that which is specified is the only business which is to be called

extraordinary business on the one side and ordinary on the other,— Sept. 29, 1831.

“ and shall have full power to purchase or sell any heritable pro-
“ perty, to feu, or take in lease, lands or houses connected with or
“ which may be necessary for the foundry department.” That is
considered as ordinary business,—“ but declaring that the com-
“ mittee of management only, or a majority of their number, shall
“ have power to enter into any agreement regarding the purchase
“ or sale of any heritable property, feuing or taking in lease lands,
“ mines, metals, or minerals for the smelting department,” for the
reason I have flung out, the one being of large and the other of
small importance; “ providing always, that such agreement shall
“ not be binding on the partners, unless approved of at a general
“ meeting to be called for that purpose.” Even if it is by a general
committee, the business of the smelting department shall not be con-
ducted unless the general meeting sanction it. “ And it is further de-
clared ”—which I cannot reject from my consideration of this clause,
for we must construe the terms ordinary and extraordinary business by
what follows:—“ That the committee of management, or the majo-
“ rity of their number, shall have power and they are hereby autho-
“ rized to nominate and appoint a manager, agents, and other officers
“ of the company, and generally all clerks and servants whom they
“ may deem necessary for the business of the company, with power
“ also to fix the salaries, allowances, or wages of such persons, and
“ to dismiss all or any of them whenever they may think proper.”
Now, can any person read this section without being convinced that
what follows the words “ ordinary business ” is intended to limit
ordinary business, and that all which is not strictly within the limit is
comprehended in the subsequent part as extraordinary business. In
the first place, can any person, consistently with the common rules of
construction, say that that which has been suggested from the bar is
the sound mode of interpreting these words? One answer is decisive.
If this is intended to limit the description of ordinary business, that
which follows must also, by parity of reasoning, limit the expression
of extraordinary business. If, taking this as the foundry department,
the ordinary business is confined to that, so the words relating to the
smelting department, and so forth, must, in exact parity of reason, be
taken to be only description and definition of extraordinary business;
and what follows must be considered as having the highest degree of
importance, namely, the dismissing a common servant, or the saying
whether he shall have twelve or eighteen pounds. Now, it is use-
less to observe that that would be the wildest construction to be put
upon these words, and accordingly no person has maintained that
construction, though it has been argued that the words “ ordinary
“ business ” are to be taken as mere tautology, for that ordinary

Sept. 29, 1831. business follows by enumeration. It is a more clear and less absurd view of the subject certainly, to say that you are to construe the words "ordinary business" with reference to what follows, and that what follows does not exhaust the description of ordinary business, but is merely a sort of outline by which you are to be guided in discovering the meaning of the word "ordinary." Perhaps I might not much object to that, if I did not see that what follows is held to be something excepted out of the description of ordinary business, rather than qualifying it either directly or by analogy. It is quite clear that the dismissing a servant or the apportioning his wages is the most ordinary of all ordinary business; and therefore, if it had not been conferred upon the general committee, to the exclusion of the quorum by the latter part of the section, it would have come under the description of ordinary business—the five might have done it; and therefore I should hold that, in soundness of construction, the words "ordinary business" are so far from being controlled by the latter part of the section, that the latter part of the section has taken out of that which may be considered as ordinary business, and which is done, generally speaking, by the quorum—one branch of ordinary business, and conferred it upon the majority of the committee;—that is the only sensible and rational construction I can put upon this clause. Now it is said that, independent of this, the term "ordinary business" certainly must mean to include this business of making calls upon shares. My Lords, I cannot go so far; I look upon "ordinary business" to mean business of constant occurrence—of daily and weekly occurrence—which does not require the calling a general meeting—which does not require that the proceedings should be suspended for want of a larger number of persons. The reason why quorums are appointed at all is not, in most cases, for the transaction of concerns of importance, but that the quorum named may do the common and ordinary business. It is not uncommon to have a small quorum limited by the amount of the business they are empowered to transact; but can it be said that the making of calls is a matter of common occurrence? No; for ten operations, or five operations, if you are to have two orders in one day, payable on different days, will exhaust the whole of that branch of business—that will not, therefore, be of frequent occurrence; but even if it were to be for smaller sums and not two calls made at a time, it is clear that is by no means an ordinary transaction. My Lords, I should distinguish between the dealing with the annual expense, the wear and tear, the profit and loss, and any dealing whatever with the capital, the corpus, the subject matter of the property. The same observation would apply, whether to a joint stock company or a part-

nership, both in respect of its occurrence and in respect of its importance. Can it be said, that the instalments by which and the times at which the capital shall be paid up are matters of inferior or subordinate consequence? I take them to be clearly the reverse. I conceive, that if the shareholders, at the time those clauses were framed, had been told, "Any five of the committee may order you to pay up the whole—it does not require the whole seventeen; the whole seventeen are required to turn off a servant, even though he may be a thief; that is an important matter which they cannot do without a public meeting; but any five may order you to pay up the whole of your shares,"—it would have astonished them a good deal. In none of the lights in which I have put it can I bring my mind to see on what ground the opposite has been ruled by the learned judges in the Court below; but if I am right, instead of the debt being due, and the obligation contracted, and the question only being as to the mode in which it shall be enforced, the question is, whether the debt does exist, whether the obligation has been contracted, and whether that which the party is now called upon to do is that which he has bound himself to perform? Now, he has bound himself to pay instalments, if those instalments are called for in a prescribed mode; and this is not only a point put at the bar, but it is clear it was one of the most important matters the parties had in view when they were binding themselves on the one hand, and stipulating for themselves on the other that they shall not be called upon to pay unless the demand is made in a particular way; and I consider this not a mere technical objection, though indeed it would be sufficient if it were. Now, let us refer to a part of the elaborate judgment of the Lord Ordinary, and see whether he has very successfully dealt with this matter:—"There seems no objection to the mode in which the calls were made;"—the question is, whether there is not an objection? "They are to be made by the directors or committee of management;" so they are. The question is—how? "And it is declared by the fifth clause, that any five of the number shall be a quorum for ordinary business. What shall be considered as 'ordinary business' seems"—(now that is just the point in the cause)—"a point which admits of being determined by the practice of the company; and, according to that view, the calls for instalments seem to have been understood as falling under that description." Now, who "understood" it so, or in what way we find that any one so understood it, I cannot tell. It is said the appellant attended a meeting at which the fact of calls having been made was reported, but there is not a tittle of evidence of his having attended that meeting, except the production of the minute; and when you look at the minute, it does not appear

Sept. 29, 1831.

Sept. 29, 1831. that he understood any thing of the kind which now appears, for it only says that the report of the committee set forth that two calls had been made, namely, one pound and twenty-five shillings, and that was followed by a vote of thanks to the committee who made the report; but it does not say that this was reported as a call by the committee of five. For any thing which appears it may have been by a committee of nine, or it may have been unanimous. There is no proof whatever of the practice of the company having been as assumed; and even if there were, there is no proof that this party was cognizant what was the fact; and when we are told that it has been understood that those calls fall within the description of ordinary business, I feel it proper to say I can find no evidence of that. The learned Judge then proceeds, "Besides, the seventh clause evidently includes, as falling under the powers of a quorum, various acts which seem, to say the least, as important and extraordinary as that of calling up the instalments of the subscriptions." There are certain things—the turning away clerks, or the apportioning their wages—which might be considered ordinary business, but which still are not to be allowed to be done by a quorum of five—they are to be done by a quorum of the whole nine, (which the Lord Ordinary seems to forget,) "as important and extraordinary." There is a special provision as to the making arrangements ancillary to carrying on the foundry business. I may be disposed to admit that is as important as the calling for instalments on shares; but then the section does not leave it to the words "ordinary business;" it says, notwithstanding, a quorum of five are to have the power of transacting ordinary business, we do not rest upon that, but give them, per expressum, the power of letting and selling as far as regards the foundry, and no further. Taken accurately, that makes as much against the inference of the learned lord as for it, and I should say more. For these reasons I am unable to understand or to follow the grounds of the learned lord who has pronounced this interlocutor. On these grounds, I move your Lordships that the interlocutor of the Court below be reversed.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

Appellant's Authorities.—Carey on partnership, 1825, p. 595, 160–1.; Wms. Saunders, 1. p. 291; 2. p. 116; Gow, ed. 1825, p. 109, Appendix, 404; 2 Ersk. 3, sec. 25; 1 Montagu, p. 89; 2 Bell's Com. pp. 634, 641, 2, 4, 8; 2 Merivale, p. 614; Marshall, 26th Jan. 1815; Bell's Principles (and cases there quoted), p. 91–2; Portable Gas Company, 13th Feb. 1829, (S. & D.); Moore v. Hammond, 30th April 1827; 6 Barnwell and Cresswell, p. 456; stat. 1696, c. 15; 1592, c. 179; 1593, c. 175; 1681, c. 5; 1540, c. 117; 1570, c. 80; 1680, c. 5.

Respondents' Authorities.—Shott's Iron Company, 19th Jan. 1828 (6 S. & D. p. 399); Sept. 29, 1831.
 Culcreuch Cotton Company, 27th Nov. 1822 (2 S. & D. p. 47.); Adair v. New
 River Company, 2 Vesey, p. 429; Cockburn, Vesey, 16, p. 321; Cheyne, 2d Dec.
 1828 (7 S. & D. p. 110.); Somervail, 22d Feb. 1830; Fife Bank, 7 Shaw and
 Dunlop, p. 60; 3 Ivory's Ersk. 2, 614.

SPOTTISWOODE and ROBERTSON—MONCRIEFF, WEBSTER, and
 THOMSON,—Solicitors.

GEORGE HUNTER, Appellant.—*Mr. Serjeant Spankie—
 Mr. Sandford.*

No. 49.

Honourable Mrs. C. COCHRANE and others, Respondents.—
Dr. Lushington—Mr. Rutherford.

Partnership.—Usury.—Reparation.—Two individuals, having entered into a joint speculation in the purchase of an estate, held (affirming the judgment of the Court of Session),—(1.) That neither party was liable in damages for the manner in which this joint adventure was conducted. (2.) That, notwithstanding a change of circumstances, the eighth article of their contract of copartnery remained binding. (3.) That one of the parties was prevented from objecting to an accountant's report, and was not entitled to factor-fee. And (4.), That it was not usurious for the parties to stipulate that interest should be allowed by the one to the other out of the clear rents and profits of the estate, including the making a rest at the end of the year.

IN 1808 George Hunter and the late Honourable Basil Sept. 30, 1831.
 Cochrane purchased jointly the estate of Auchterarder for
 50,000*l.* on speculation. The purchase was made by them
 under a written contract of copartnery to endure for eight
 years. Cochrane was to advance the money, and have the
 titles in his own name, but Hunter was to act as manager and
 factor, and received a factory for that purpose. The estate was
 to be divided into lots and re-sold, and the parties were to share
 equally the profit and loss. The fourth article of the contract
 provided, “That the said Basil Cochrane and his foresaids shall,
 “on the 15th day of May in every year, state an account of the
 “said price of 50,000*l.* so advanced and paid by him as afore-
 “said, and of the interest thereof to that period, and of such sum
 “or sums of money as may have been laid out and expended
 “in improvements as aforesaid, and of the interest thereof to

2D DIVISION.
 Ld. Mackenzie.

Sept. 30, 1831. “ that period ; and such interest being added to the principal
“ sums, there shall then be deducted from the said aggregate
“ sums of principal and interest what shall have been actually
“ received for the time from the net rents and profits of the
“ said lands and barony of Auchterarder and others, or from
“ the proceeds of any sale or sales to be made thereof, or any
“ part thereof, (the expenses of management, and the expenses
“ of such sale or sales, being paid in the first place,) and the
“ balance shall be held to be a principal sum, bearing interest, and
“ be carried over to the next year’s account; and both parties
“ agree that such rents and profits, and the produce of such sale
“ or sales as aforesaid, shall, after paying the expenses of
“ management out of such sale or sales, be applied in manner
“ herein-before directed in payment to the said Basil Cochrane
“ and his foresaids of the sums principal and interest before
“ specified.” And the eighth article provided, “ That the
“ whole matters aforesaid shall be transacted and completed in
“ the space of eight years, to be computed from and after the said
“ 15th day of May last (1808), and a final account shall then
“ be settled of the whole matters therewith connected in the
“ manner aforesaid ; and if any part of the said estate shall then
“ remain unsold it shall be valued by two indifferent persons,
“ one chosen by the said Basil Cochrane and his foresaids, and
“ the other by the said George Hunter and his foresaids, with
“ power to the persons so chosen to name an oversman or
“ umpire in case of their difference in opinion,” &c.

In 1812 Hunter became desirous to dispose of the estate. He was offered 60,000*l.* for it, but Cochrane objected to the sale, and recalled Hunter’s factory; and it afterwards was disclosed that he had burdened it with an annuity of 1,500*l.* in favour of his wife. Hunter then raised an action, concluding that he should not be liable for any loss that might arise under the contract; that he should be found entitled to 5,000*l.* of damages in respect of Cochrane having objected to the sale, and that the estate should be sold. Cochrane raised a counter action, concluding, inter alia, that the whole fee and property of the estate should be found to be in him; that he had the sole right of management; that Hunter should deliver up the writs in his possession, and be found liable in damages for withholding them, and for breach of agreement.

Sept. 30, 1831.

These actions being conjoined, the Lord Ordinary (11th March 1814) found, “ primo, that the fee and property of the lands and
“ barony of Auchterarder is vested in the said Basil Cochrane,
“ but that he holds the same in trust for behoof of himself and
“ the said George Hunter under the conditions specified in the
“ agreement executed between them on the 5th and 8th
“ October 1808; and finds that, in virtue of the agreement
“ above referred to, the said George Hunter is entitled to de-
“ mand from the said Basil Cochrane, in the event of the whole
“ estate remaining unsold when the demand is made, a disposition
“ or conveyance, with the usual clauses, to a moiety or half of
“ the estate, on his making payment to the said Basil Cochrane
“ of the half of the original price, together with the half of the
“ expenses of improvement and of management, deducting the
“ rents which have been received, or a disposition or convey-
“ ance, with the usual clauses, to the half of the remaining
“ property, if a part shall be sold, on his paying a half of the
“ balance of the price remaining unpaid to the said Basil
“ Cochrane, and a half of the expenses of improvement, as
“ provided for in the contract: Finds, secundo, that the fee and
“ property of the estate being vested in the said Basil Cochrane,
“ and he being empowered and taken bound by the fifth article
“ in the deed of agreement to re-sell the lands, he has it in his
“ power to grant effectual conveyances to third parties, or to
“ burden the estate with debt in favour of the heritable credi-
“ tors, and that the purchasers or creditors would be secure
“ whether Mr. Hunter had consented to the transaction or not;
“ but finds that, as the said Basil Cochrane holds the estate as a
“ copartnership concern between himself and Mr. Hunter, in the
“ profit or loss from the sale of which Mr. Hunter is to have
“ a joint and equal interest, so the said Basil Cochrane is
“ bound to consult with the said George Hunter, and to obtain
“ his consent before either selling the lands or burdening the
“ same with debt, or taking any such step which may affect the
“ said George Hunter’s interest in the estate or value thereof;
“ and finds, that if Mr. Cochrane does otherwise, he will be
“ liable in reparation to Mr. Hunter of his share of any loss
“ that may accrue from the sale, or burdening with debt of the
“ lands; and finds, that, on the principles now stated, the said
“ Basil Cochrane is bound to obtain and record a discharge

Sept. 30, 1831.

“ and renunciation of the life-rent infestment taken in favour of
“ his wife over the estate: Finds, tertio, that in respect the said
“ Basil Cochrane is feudally vested in the fee of the estate, and
“ in respect the factory granted by him to the said George
“ Hunter is expressly declared in gremio thereof to be re-
“ vocable, the said Basil Cochrane was entitled to recall
“ the factory, assoilzies him from the conclusion of the action
“ at the instance of the said George Hunter, founded on the
“ revocation of the factory, and on the appointment of a diffe-
“ rent factor; but finds that the said Basil Cochrane is liable to
“ the said George Hunter for any damage which the latter can
“ instruct to have been sustained by the copartnership concern
“ in consequence of mismanagement of the estate on the part of
“ the said Basil Cochrane; and that, on the other hand, the said
“ George Hunter is liable to Mr. Cochrane for any loss that
“ may be proved to have been suffered by the conduct of the
“ former while he had the charge of the estate: Finds, quarto,
“ that the said Basil Cochrane is liable to the said George
“ Hunter for his share of any loss which it may be proved by
“ the said George Hunter, after the estate shall have been sold,
“ has been sustained in consequence of the said Basil Cochrane
“ having refused to accept of offers for a sale of the lands and
“ barony; but finds that it cannot be ascertained whether such
“ damages are incurred, or, if incurred, what is the amount
“ thereof, until the estate shall have been sold, or the time shall
“ have arrived when the transaction between the parties is de-
“ clared by the deed of agreement to be brought to a conclusion.
“ In the action of declarator at the instance of the said Basil
“ Cochrane against the said George Hunter, finds, primo, that
“ the said Basil Cochrane has failed to show any sufficient reason
“ for insisting that the said George Hunter shall find security to
“ him for half or moiety of any loss or defalcation that may be sus-
“ tained at the winding up of the concern, or sale of the lands,
“ and therefore assoilzies the said George Hunter from the
“ conclusion to this effect of the action against him: Finds,
“ secundo, that the said George Hunter is bound to deliver to
“ the said Basil Cochrane or his commissioner the whole writs
“ and evidence, title deeds, leases or missives of lease, and
“ plans or maps of the lands, and that he is liable in damages
“ to the said Basil Cochrane for any loss or damage which may

“ be proved, after full and due investigation, to have been sus- Sept. 30, 1831.
“ tained in consequence of his refusal to deliver up the papers
“ referred to, or any of them, if it shall appear that any damage
“ has been incurred through the refusal to deliver up these
“ papers. Lastly, finds the said George Hunter bound to hold
“ count and reckoning with the said Basil Cochrane for the
“ rents received by him, and for the prices of the timber cut and
“ sold, and ordains him to produce in process the roup-roll of the
“ timber, and the bills which he states were taken by him for the
“ price ; finds it unnecessary to decide further with regard to
“ the other conclusions of the action at the instance of the said
“ Basil Cochrane, in respect these conclusions are already disposed
“ of in determining with regard to the conclusions of the previous
“ and counter action ; and, on the whole matter in dispute,
“ decerns and declares according to the above findings.”

The Court adhered. A remit having been made to Brown, land surveyor, he reported as to the most expedient method of selling the estate ; and the Lord Ordinary (11th March 1817) found, “ That the eighth article of the agreement, in so far as it
“ directs that if any part of the estate shall remain unsold on
“ the 15th May 1816, a valuation shall be made by certain
“ persons as therein mentioned, cannot furnish the rule of
“ bringing the parties to issue in the circumstances which have
“ taken place ; and finds that the estate must be sold in whole
“ or in lots by Mr. Cochrane, as a property held by him in
“ trust for behoof of himself and Mr. Hunter, and in order to
“ regulate the interests of these parties in the price, and their
“ other rights and interests arising out of the contract, and
“ which are sanctioned by the interlocutors of the Court.”

The Court, however, (1st July 1819) altered this interlocutor, and found, “ That the eighth article of the deed of agreement
“ between the parties must take effect, and that the estate must
“ now be valued in the manner therein pointed out ; or in case
“ of the parties failing to choose two indifferent persons for that
“ purpose, then at the sight of the Lord Ordinary, in such
“ manner as his Lordship shall direct, and remit to his Lordship
“ to proceed accordingly.”

Brown again reported, stating his opinion as to what was a fair price for the estate generally, without specifying any particular value on the wood and minerals, but specially excepting

Sept. 30, 1831. from the valuation a share of a common muir, in respect he did not consider himself a good judge of such property. The report was approved of, and a remit was afterwards made to Russel, an accountant, to state how the account stood between the parties. The Lord Ordinary thereafter (11th July 1820) found, “ In
 “ terms of the eighth article of the deed of agreement between
 “ the parties, that Mr. Cochrane is now entitled to retain what
 “ remains unsold of the estate at this time, and allows both
 “ parties to see and object to Mr. Russel’s report, if they, or
 “ either of them, think fit so to do, and to be heard on the
 “ points of the cause which are still undecided.”

Condescendences were then ordered as to damages; but upon advising the statements of parties, the Court * (27th May 1824) dismissed all the claims of damages hinc inde, and remitted to the Lord Ordinary. Hunter then contended that, under the interlocutors of the Court, the value of the estate must, in a question of accounting between the parties, be taken, not as at Martinmas 1819, but Whitsunday 1816; but the Lord Ordinary repelled the objection, and the Court adhered. Thereafter, Cochrane having died, his Lordship (8th July 1828) found,
 “ That the trustees of the late Honourable Basil Cochrane offer
 “ either to take, or to allow Mr. Hunter to take, the moor of
 “ Auchterarder at the price specified in their minute; and in
 “ respect Mr. Hunter is not willing to take it, finds that the
 “ trustees are entitled to retain the said moor at that valuation,
 “ with interest thereof from the date at which this interlocutor
 “ shall become final, and that this valuation falls to be sub-
 “ stituted in place of the valuation of Mr. Brown in this
 “ respect; and with this variation repels the objection to
 “ Mr. Brown’s report, and decerns accordingly.”

The Court adhered.

Hunter then lodged a minute, craving that, in addition to the value put upon the estate by the surveyor, additional sums ought to be allowed for the church seats attached to the estate, for the wood and for the minerals; he also claimed a commission for trouble in managing the estate while it remained in the

* 3 Shaw and Dunlop, p. 79.

joint possession of the parties; but the Lord Ordinary (30th November 1830) found, “ That after the approval of Mr. Brown’s report, which is final, it is not competent for the pursuer to bring forward the present objections, and therefore repels the same, and repels also the pursuer’s claim on account of his own trouble;” and the Court (18th February 1831) adhered.*

Hunter appealed.

Appellant.—(1.) The whole loss which has arisen in consequence of the joint speculation having been occasioned by the improper conduct of Cochrane, no part of the loss can justly be thrown on the appellant, but, on the contrary, the respondents have rendered themselves liable to the appellant in damages. Accordingly, he ought to be assoilzied from the conclusions of the action raised against him by Cochrane; and, on the other hand, in the action raised at the instance of the appellant, he ought to be relieved from all the loss which has arisen from the said speculation, and found entitled to damages. (2.) It has been found by a final judgment of the Court of Session, not appealed from by the respondents, that if loss has been sustained in consequence of Cochrane having refused any offer of purchase for the lands and barony of Auchterarder, the appellant is entitled to the damage which has arisen in consequence. (3.) At all events, the eighth article of the agreement concluded between the parties became inapplicable to the circumstances in which they were placed, and ought not therefore to have been enforced in the manner now complained of. (4.) Even if the eighth article of the deed of agreement had been binding upon the parties, it was plainly the valuation of the estate as at May 1816, and not at any subsequent period, which must form the rule of settlement between the parties.

Respondents.—(1.) It is clear, that in terms of the eighth article of the deed of agreement between Cochrane and the appellant, what remains unsold of the estate of Auchterarder is the exclusive property of the respondents as his representatives,

* 9 Shaw and Dunlop, p. 477.

Sept. 30, 1891. and that the appellant is bound to relieve them of one half of the loss incurred by the joint adventure. (2.) The appellant's own acts and deeds, judicial and extra-judicial, make it impossible for him, consistently with law or justice, to challenge the Lord Ordinary's interlocutor of 11th July 1820, by which Cochrane was found entitled to retain what was then unsold of the estate. (3.) The claims of damage by which the appellant has attempted to compensate the legal claim against him for payment of his half share of loss are frivolous and unfounded. In the whole transaction Cochrane was the party misled, and he violated no legal right competent to the appellant; and, (4.) The value of what remains unsold of the estate having been fixed by reference to Brown in 1819, and his report having been approved of by the Court below without objection, it ceased to be competent for the appellant to insist some years afterwards that the estate should be valued speculatively, with a view to its supposed marketable price in May 1816. Any complaint about the value of the muir must now be frivolous. The value of it was correctly ascertained by a report of the referee Mr. Brown, who, from being originally chosen by both parties to affix a definitive value to the whole estate, had a right to determine the value of this appendage; but, the respondents closed with the appellant's own proposal to give him credit for more than double the ascertained value of it. The pretext, that growing trees, minerals, market-customs, church-sittings, &c. had been overlooked in the valuation, being totally unfounded in fact, and irrelevant in law, no attention is due to them. The appellant's claim for factor-fee is unsupported by the terms of the commission under which he acted, is opposed to his own declarations subsequent to the period for which it is claimed, and is out of time, being brought forward upwards of fifteen years after the rendering of his factory accounts, which contain no charge of the kind, or reservation of it.

The point was also raised, but which had not been argued in the Court below, that the contract was colourable, illegal, and usurious.

Lord Chancellor.—My Lords, in consequence of some observations that have been thrown out here, for the first time, respecting the usurious or illegal nature, in the respects specified, of the agree-

Sept. 30, 1831.

ment made between Cochrane and Hunter, I thought it right to turn the attention of the counsel to that matter, because it had not been argued in the Court below. It is inconvenient though not incompetent to have objections sprung upon us for the first time here, and this not unfrequently occurs, not only in Scotch, but in English and Irish appeals. I am, upon the whole, disposed to recommend to your Lordships to affirm the interlocutors of the Court below. The only part to which I shall call your Lordships' attention is that which has not attracted the attention of the Court below. Upon the best consideration of this contract, I do not think, in the circumstances of this case, that it can be taken to be illegal as between the two parties. It is perfectly clear, and cannot be doubted with respect to the English law, after the decisions of the courts of Westminster Hall, that in a court of law in this country an agreement to make a rest at the end of the year—a general agreement for compound interest—for interest upon interest, is bad (for that is a cover for gross and rank usury); but an agreement which beforehand shall stipulate that the interest at the end of the year shall accumulate without a new transaction—without a new loan or agreement of that description—that it shall then become principal, and bear interest, has been, in a case which ran the gauntlet of all the lawyers in Westminster Hall, declared in most explicit terms not to be invalid. At the same time it is perfectly certain, that the Court of Session is a court of equity as well as a court of law, and may admit of those considerations on which, in respect of such agreement, the courts of equity in this country are thought to discountenance such proceedings; and it is said that in a very well known case—I think of a West India mortgage—in which there was an agreement to accumulate interest, and make it become part of the principal, Lord Eldon within a year or two after he came to the Great Seal, though he distinctly admitted there was nothing illegal, yet said, that a court of equity would discountenance such a transaction; he even went so far as to say that it would not permit it, because it had a tendency towards usury, but still (having regard to the decisions in the courts of Westminster Hall) he said that it certainly was not illegal. There might be some doubt, therefore, taking the Court of Session to have an equitable as well as a legal duty to perform, whether, in such a case, they would not have been bound to sustain this objection, had their attention been called to it; and if they would have been bound, had their attention been called to it, we are bound to put ourselves in their place, and to do for them what they ought to have done, or, at all events, we should have been bound to remit to the Court below for further consideration; but when your Lordships come to look at the present case, you must see that it is not a transaction of the kind alluded to, and cannot, in its

Sept. 30, 1831. circumstances, be void, as a transaction for the loan of money, either by way of loan upon a bond or upon mortgage, which was the nature of the case of *Chalmers v. Golding*, decided by Lord Eldon. It is an arrangement with respect to a partnership in a land speculation. £50,000 was to be advanced to purchase the land by one of the two copartners, and the skill and work and labour to be bestowed upon the investment were to be contributed by the other copartner; and in making their arrangement beforehand they had agreed between themselves, that interest should be allowed by one of the partners to the other out of the clear rents and profits of the estate, in a certain proportion, and including the making a rest at the end of the year. Now, it is quite clear that no jury of the country would find that to be usury since the case of *Carstairs v. Stein*, which was tried at Guildhall, and underwent great discussion, on the motion for a new trial. The question of usury is precisely a question of fact for the jury. That was the case of a supposed undue commission; and the question here to go to a jury, under the direction of the learned judge, would be, whether this whole transaction was or was not a shift for receiving more than five per cent. Now, no jury could look at this transaction, and doubt about it. I think it cannot be construed into a cover for obtaining more than five per cent., therefore I have no doubt whatever, had this matter been brought before the Court below, as it has been before your Lordships, even if their opinion had been that, exercising a sort of equitable jurisdiction, as well as legal, they ought not to countenance transactions of the nature I have described; nevertheless, they would not have considered this as one of that class of cases which they were bound to discountenance, much less disallow, on the ground of the contract being colourable and a cloak for usury. I am therefore of opinion that your Lordships ought to affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

MACDOUGALL and BAINBRIDGE—SPOTTISWOODE and
ROBERTSON,—Solicitors.

BURNTISLAND WHALE FISHING COMPANY, JAMES FARNIE,
and others, Appellants.—*Lord Advocate, Mr. F. Pollock, and*
Mr. Mac Niell.

No. 50.

WILLIAM TROTTER and others, Respondents.

Nuisance—Interdict.—Found (affirming the judgment of the Court of Session), that it is competent to grant interim interdict prospectively against boiling whale blubber in the neighbourhood of a burgh.

WILLIAM TROTTER and others presented a bill of suspension and interdict to the Court of Session, stating that they were proprietors in fee or in life-rent of very valuable property in the burgh of Burntisland and its immediate vicinity; that Farnie and others had formed themselves into a whale-fishing company, and had recently begun to erect storehouses and boiling houses upon certain premises in the town for the purpose of storing and converting into oil the whale blubber the produce of their fishing; that this would form an intolerable nuisance, and therefore praying for interim interdict, and that the bill should be passed. In support of this they rested mainly on the case of *Dowie v. Oliphant*, 11th December 1813. Farnie and others admitted that they had formed a company, and were in the course of erecting buildings for the purpose alleged, but they denied that in the circumstances the boiling of whale blubber would constitute a nuisance, and that the respondents were entitled to object to it. They stated that numerous works equally if not more offensive had existed for time immemorial at Burntisland, that the contemplated operations were to be carried on adjacent to the harbour and close to the sea shore, and the works were to be formed in such a manner as to prevent any noxious effects being experienced. Although therefore they had no objection to the bill being passed to try the question, yet they contended that interim interdict ought not to be granted, because this would be to prohibit that which was prospective, and as to which no evidence had or could competently be taken till after the bill was passed, and therefore it would rest entirely upon a mere hypothetical assumption of the truth of that which was denied. Lord Fullerton passed the bill, but refused

Oct. 1, 1891.

2D DIVISION.
Bill Chamber.
Lds. Fullerton,
Balgray, and
Cringletie.

Oct. 1, 1831. to grant interim interdict. Trotter and others did not reclaim against this judgment, but allowed the bill to be taken out of Court by a certificate of non-signeting, and thereafter presented another bill, on advising which Lord Balgray granted interim interdict, and appointed it to be answered. The case having thereafter come before Lord Cringletie, he reported the bill and answers to the Court, accompanied by the subjoined note.*

The Court appointed Farnie and others to give “in a minute
“ stating in detail in what manner they propose carrying on the
“ operation of boiling whale blubber, and what plan they mean
“ to adopt by which a nuisance may not be created by them.”†

* The Lord Ordinary is not moved by the cases quoted by the respondents, *Young v. Bowie*, 20th Nov. 1824, and 29th May last, *Scott v. the Commissioners of Police in Leith*. In both these cases the question was, whether the matter complained of was a nuisance or not? If the nuisance be not admitted, or be not notorious, the Court will not grant an interdict till the grievance be ascertained. But the boiling of blubber, or even the keeping of it, unless in vaults, as observed by Mr. Rennie, it being a putrid matter, has been recognized by the Court as a nuisance in the case of *Dowie v. Oliphant*, 11th December 1813, and an interdict was there granted by the Lord Ordinary on advising the bill, and affirmed by the Court. Were it therefore beyond all doubt that the boiling house in question would be a nuisance, the Lord Ordinary would have no hesitation in pronouncing an interdict on this bill, and the difficulty arising from the forms of the Jury Court would not move him, seeing there is no use for proving to a jury what is notorious to and admitted by all the world. But the documents, printed and written, which the Lord Ordinary has seen, incline him to let the Court see them, and judge of the propriety of an interdict at present, for it is admitted the bill should be passed to try the question. The Lord Ordinary has been often at Burntisland, but cannot admit the purity of the air being contaminated by nuisance. Curing herrings is to prevent putrescence, which creates offensive odours, and cannot be a nuisance if the offal be not left to putrify. What the soap-boiling may have been he knows not, as it has ceased long ago. He must add his concurrence with the complainers in the doctrine, that because there may be one or two nuisances in a place, that is no reason for multiplying them. There appears also doubt whether the second bill is competent, it not having been offered to the Lord Ordinary of the next week after Lord Fullerton. A reclaiming note may cure this defect in form.

† *Lord Justice Clerk* observed.—As to the question of competency, I am of opinion, that as the complainers dropped the former bill, they are entitled to begin *de novo*. The former bill does not now exist. This is a fresh process.

Lord Glenlee concurred.

Lord Cringletie.—On the merits, I agree in opinion with what has been said by the dean of faculty, that every question of nuisance must be regulated and determined by the locality and the degree of what is stated to be the nuisance. Questions of this sort, in the general case, are proper to be tried by a jury, but there are others, again, where the intervention of a jury is not necessary. If, for example, a slaughter-house

They accordingly did so, and stated that they proposed to have a cistern in the form of a vault, for the reception of the refuse

Oct. 1, 1831.

for cattle were erected in St. Andrew's Square, it would not be necessary to remit the question, whether it was a nuisance or not, to the trial of a jury, because the common sense of every man would convince him that there it would be a nuisance. Interdict in such a case might very properly be granted at once. But then, what is a nuisance in itself is not a nuisance every where. Works of great public utility are very often of an obnoxious and offensive description; but then, unless we are to prohibit them altogether, it is evident that they must be built somewhere. Much will depend, in many cases, on the mode in which the buildings are constructed. In the case of Dowie, a house for boiling blubber, placed in a particular situation, was found to be a nuisance. But that case was decided in 1813, and since that time many manufactures have arisen which were not then known, and numerous improvements on the manufactures which were then carried on have taken place. Now it is quite possible that there may be a mode of correcting that which would otherwise be a nuisance. Mr. Rennie gives us a good example when he cites the instance of a chimney of a steam-engine of a great public work, the smoke proceeding from which would prove a nuisance if not from its extreme height of 130 feet, and the good management of the fire, which render it as inoffensive as any ordinary chimney. As to the case of Dowie, it must be remarked that a boiling house, when proposed to be erected near to the middle of the town of Kirkaldy, was found to be a nuisance, but that when placed at the end of the town and near to the sea shore, it was found not to be a nuisance at all. Now is it not, with respect to the latter circumstance, very much the same case here? The boiling house is built on a projection into the sea, and when the wind is east or west or north, the whole smoke is blown down upon the sea. Again, it may have been or may be so constructed as not to be a nuisance at all. It is said that the blubber is allowed to get into a putrid state, and that it must therefore be oppressive and a nuisance; but we find, from Mr. Rennie's report, that it may be so stored in vaults as to be no nuisance; if so, then the only other things which could prove a nuisance would be the smoke and the effluvia arising from the boiling of the fish. But are we to decide without evidence, that, in the particular spot chosen for the boiling house, the boiling will be a nuisance? We find that some of the neighbouring proprietors will not submit to the erection; but, on the other hand, we find some acquiescing, and others perfectly willing that it should be erected. Now, how can we know at present whether it may not be so constructed as not to be a nuisance? Mr. Rennie informs us that there are several erections of a similar kind near to the town of Deptford, and other places in a populous neighbourhood, and that he never heard them complained of. His opinion is as good as ours, and I think it would be hard to decide without experience, and, on the assumption that the boiling house would prove a nuisance, to grant the interdict. There is only a single whale to boil, and the boiling of that single whale will afford a sufficient experiment to enable the parties to judge whether the boiling be a nuisance or not, and supply us with proper evidence on which the question may be decided. If the boiling should not prove a nuisance, I do not see why the company should not boil all the whales in Greenland. At present, I do not think that we are in a state to grant the interdict.

Lord Glenlee.—It is settled law, by the case of Dowie, that the boiling of whale blubber is a nuisance, and there the interdict granted was perpetual. If any statement were made, or minute lodged, specifying the causes why any after injury could

Oct. 1, 1831. after boiling, built inside the boiling house, close covered in and regularly emptied early in the morning ; that the boiler would

not be sustained, it might be proper to refuse the interdict in hoc statu. This course was followed in the case of Scott. The party complaining alleged a nuisance, but the party complained upon expressly disclaimed any intention of using the property in such a way as to give origin to a nuisance. In consequence of this qualification the interdict was refused, reserving to the party who apprehended the nuisance to apply for the remedy of an interdict whenever the nuisance should actually occur ; but that was on the ground of an express disclaimer by the party who was alleged to be about to commit the nuisance. It is said that it is hard for the company to be kept from boiling blubber, and that the proposed boiling would do no harm. Now, if any qualification of intention, or any specification of the mode by which the boiling would not prove a nuisance, had been made, we ought not, perhaps, to grant the interdict ; but here I find nothing of the kind. The company assume the summum jus in their answers, and argue that they are entitled to boil blubber when and how they please. But in law their argument is not correct ; it is fixed law that the boiling of whale blubber is, ipso facto, a nuisance. How, then, can we judge that it will not prove a nuisance by any new invention or process of manufacture ? The proper way would be to pass the bill to try the question of right, and to continue the interdict against actually boiling blubber in the meantime. The interdict sought is, perhaps, too extensive, but that is a point which cannot well be determined until the bill is passed. As to this, it is plain that we must have farther evidence.

Lord Justice Clerk.—I feel considerable difficulty in the present case, owing to the decision pronounced in the case of Dowie. By that case the law has been fixed to be, that the boiling of whale blubber is a nuisance. We cannot interfere with the authority of that case ; but the question for our consideration seems to be, whether it is in all respects similar to the present, or can afford a precedent exactly in point ? There may be a great difference between the two cases, from the locality chosen for the erection of the boiling house and other causes. The work here is built at an extremity of land projecting into the sea ; and I observe from the papers before me that the site is stated to have been formerly occupied with works for the curing of herrings, certainly an offensive operation, both from the smoke and from the stench of the putrid offal which is collected. This consideration may be of some weight ; but the main thing seems to be, whether the work, by its local position, comes within the sphere of the decision in Dowie's case ? On this point I have had great difficulty. How, if we grant the interdict and afford no data for evidence, is the question of nuisance to be tried ? Witnesses might be brought forward to swear hypothetically, but to what result would their hypothetical opinions on oath lead ? They might, no doubt, swear to local distances, or to the current or direction of the wind in particular seasons, or the jury might obtain a view to enable them to judge of those localities ; but still the evidence of actual injury to the neighbourhood by boiling would be wanting. It would be hard, without doubt, to subject the neighbours to an intolerable nuisance ; but, on the other hand, we see that the company have built houses, that they are ready to go to work, that they have only a single whale to boil, and that the operations of one day will enable us to judge with more certainty of the nature of the erection, and of its effect on the neighbourhood, than if we had before us 500 hypothetical opinions. I am therefore for refusing the interdict in hoc statu, and passing the bill under a qualification expressed exactly in the terms used in

be capable of boiling thirteen tons at once, that the boiling would commence at a very early hour in the morning, and that the oil would not be drawn off till the afternoon, when the boiler would be cold; that the flues and chimneys would be three times higher than those in common use, and that the boiling operations would be carried on under cover with ventilators in the roof and at the cold season of the year. Trotter and others objected, that these precautions were insufficient; and on resuming consideration of the cause, the Court (7th December 1830) passed the bill, and continued the interdict in the mean time in so far as regards the boiling whale blubber in the premises in question.*

Oct. 1, 1831.

Farnie and others appealed.

Scott's case, reserving to the complainers to apply for an interdict whenever any injury shall be actually done. This, I think, will afford a complete protection to their property, and we should then have evidence on oath with regard to the actual facts, to enable us to judge whether there was a nuisance or not. With regard to Dowie's case, it affords an authority with which we ought not rashly to interfere; but there is certainly nothing which can enable us to say, in this state of the case, that it bears directly upon the present. In that case it was found that a boiling house, proposed to be erected in the vicinity of villas and gardens, was a nuisance; but, on the other hand, the two boiling houses erected near to the edge of the harbour of Kirkaldy were not found to possess that character. Every thing was made to depend upon the local position of the work. But there is also this other particular to be attended to—that it was pleaded that Oliphant and others had no interest to litigate the question, as they had, by the recommendation of the Lord Ordinary, selected a spot equally commodious for their work, close upon the beach or sea-shore near to the harbour. Situated in the middle of the town, the work would have been a nuisance; but when the work was, at the recommendation of the Lord Ordinary, removed and brought down to the sea-shore, there was then no nuisance whatever.

Rutherford.—That recommendation was made under the expedite letters.

Lord Justice Clerk.—I am aware of that; but until we have evidence that Mr. Farnie's boiling house is in all respects as injurious as Oliphant's in Dowie's case, we would not be warranted in granting the interdict. I am therefore for refusing the interdict, reserving to the complainers to apply for an interdict the moment any nuisance shall actually commence. By doing so they will sustain no injury.

Lord Glenlee.—I do not see much objection to following this plan, and imposing limitations, as in Scott's case.

Lord Justice Clerk.—It would be hard to put down the work upon mere experimental opinions, especially as it is alleged, that by the way in which the building is constructed, and the mode in which the company propose to carry on their operations, no nuisance will be committed.

* *Lord Justice Clerk.*—I have read the minute and answers in this case with very great attention, and have come to be of opinion, taking all circumstances into view,

Oct. 1, 1831.

Appellants.—The sole question is, whether the interim interdict ought to be granted, for the appellants have never objected to the bill being passed, that it might be ascertained by experience whether the operations were of the nature of a nuisance; but the effect of the interim interdict is to prevent any investigation into the facts, because the appellants are prohibited in the meanwhile from boiling whale blubber, and this even although they should do so by means which would altogether exclude the idea of nuisance. The case of Dowie affords no authority for granting an interim interdict, for in that case the interdict was not granted till after the bill had been passed, and till after the parties had, on the recommendation of the Court, erected their boiling establishment at a place different from that where they originally proposed to do so, and where

that the interdict ought to be imposed. We see that it has been positively decided, and is now fixed law, that the boiling of blubber in the vicinity of dwelling houses is a nuisance, and being so, I do not see how we can allow the respondents to commence operations. In the case where that decision was pronounced the interdict was declared perpetual; and considering this, and looking to all the circumstances of the case, I do not think that we would be warranted in removing the interdict, especially as no great injury will be done to the respondents. The bill will be passed, and the substantial right deliberately tried. I do not say that every inhabitant of a house must come forward; but when we see so many proprietors complain, and when we find them suing immediately to prevent the commencement of a nuisance, I think that we are bound to protect them by the imposition of an interdict, and that it will not do to wait, or to withhold it until they are actually disturbed by the experiments of the respondents.

Lord Glenlee.—If the interdict were confined to the actual operation of boiling, I think it should be granted. With the property, in other respects, the respondents may do as they please.

Lord Cringletie.—If the facts in the minute for the respondents (appellants) were admitted, our clear course would be to refuse the interdict. But then these facts are disputed; they are mere averments denied, and met by other statements of a very different kind. It was observed by the dean of faculty, that the Kirkaldy boiling house, in the spot to which it was removed, was, both by its local position and construction, much more offensive than this; but the observation is not at all to the point, unless it were admitted; it is a mere averment, denied on the other side, and in these circumstances I do not think we are at liberty, with the case of Dowie before us, to refuse the interdict.

Lord Meadowbank.—Looking at the case of Dowie, I think we must continue the interdict; but I must say that I do not see where whale blubber could be boiled, if not on the sea shore. As to this, however, which touches the merits of the case, I do not at present give my opinion.

Lord Justice Clerk.—We understand the interdict is to be against the boiling alone.—9 Shaw & Dunlop, p. 144.

consequently they had no interest to resist the interdict being granted. Besides, in that case the place pointed out by the Court corresponds precisely with the site of the buildings proposed to be erected by the appellants, both being on the sea-shore. At all events, the interdict ought to have been so qualified as not to prevent the appellants from boiling the blubber in such a way as to remove all objection to it as a nuisance.

Oct. 1, 1891.

Lord Chancellor.—My Lords, I do not think it necessary to trouble the counsel on the other side for any arguments. The judges in the Court below appear to have paid very great attention to this case, and their ultimate decision is entitled to the greatest respect, inasmuch as it was reluctantly come to, under the pressure of what they deemed the law and practice of Scotland, in respect of this interim order, before the matter is actually done—before the noxious erection is actually made. This is a branch of the law of Scotland which, like many other parts of the system, is derived from the civil law. According to the maxim of that law, a party was enabled to erect a building if he gave ample security that he would, at his own proper charge, pull it down in case it was deemed a nuisance. Proceeding on that wholesome and convenient rule the Scotch law has a process which we have not, enabling the nuisance prospectively to be met. Their lordships, in applying the rule to this case, at first differed materially; but in the end they were unanimously in favour of the present party who presses this interim interdict—the complainers, Mr. Trotter and others. Their Lordships were doubtless moved by a consideration of the proposed expedients for preventing the smell; I have looked at them, and I am quite of the opinion which the learned judges seem unanimously to have come to, that they are very fantastical—that they give no sort of security against the probability of the smell continuing. I should say, on the contrary, that any thing less likely to prevent it I cannot easily imagine. And there is not much of difficulty or hardship about this, for the Court will allow the parties, undoubtedly, on a new application, to make experiments; they will allow them to try this on a smaller scale or on a larger scale; they will allow them to try all the suggestions of the moment; and when they try them, if they will do, they may go before a jury. All this interim interdict does is to prevent things being done which are noxious to the neighbourhood until that question be tried. I am not at all satisfied that is not just the season to try it in that way by experiments; whereas according to the argument of the appellants, you are to have the nuisance existing probably for a year or two, and you are to have a great number of the king's subjects an-

Oct. 1, 1831. noyed, their lives perhaps not shortened, but their comforts abridged, for that time; whereas, with an experimental process, you have what may be considered a sufficient security for no injustice being done. On the whole, therefore, I advise your Lordships that this interlocutor should be affirmed. I shall look into the papers as to the question of costs; but parties need not be put to the expense of another attendance. I will let Mr. Courtenay know the result.

Lord Chancellor.—My Lords, in the case of Burntisland Company and Trotter, I have on a former occasion expressed at length the reasons on which I advised your Lordships to affirm the judgment. I only resume the question of costs; and I think, on looking into the case, which I have done diligently, that I ought to advise your Lordships to add to the judgment, “with 200*l.* costs.”

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed, with 200*l.* costs.

Appellants' Authorities.—Scott, May 29, 1830; 8 S. & D. 845; Young, 20th Nov. 1824; 3 S. & D. 307; Swan, 4th March 1830; 8 S. & D. 637; Ballemy, 3d Feb. 1813 (F.C.)

Respondents' Authorities.—Henry, 24th Feb. 1750 (13,159); Kinloch, 9th Dec. 1756 (13,163); Robertson, 2d March 1802 (No. 3. Ap. Pub. Police); Palmer, May 1794 (13,188); Kell, 2 July 1814 (F. C.); Lander, 16th June 1815 (F. C.); Jameson, 24th June 1800 (No. 4. Ap. Property); Scott, 5th July 1810 (F.C.); Dowie, 11th Dec. 1823 (F.C.); Thomas, 15th Dec. 1807 (No. 5, Ap. Pub. Police); Chanly, 5th July 1808. (No. 6. *ibid.*)

RICHARDSON and CONNEL—MONCRIEFF, WEBSTER, and
THOMSON,—Solicitors.

DAVID DICKSON and others, Appellants.—*Mr. Solicitor General* No 51.
(*Campbell*) and *Mr. Patrick Robertson*.

CUNINGHAME and Lord MEDWYN, Respondents.—*Lord Advocate* (*Jeffrey*) and *Mr. Sandford*.

Entail—Sale—Sasine—Res Judicata—Title to pursue—Personal Objection—Homologation. — 1. Circumstances under which it was held (affirming the judgment of the Court of Session).—(1.) That an entail executed in implement of a decree arbitral did not prevent an heir substitute from selling part of the estate.—(2.) That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual.—(3.) That the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of *res judicata*.—(4.) That a sasine written on nine pages, but stated in the docket to be on eight, was valid.

2. A posterior entail, inconsistent with the original one, was sustained; and an action was brought by the heirs substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it, for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute had the succession to the fee propelled to him under the second entail, and was infeft, and enrolled as a freeholder, and voted as such—Held,—(1.) That the original entail was annihilated. — (2.) That the action was not maintainable by that substitute, nor any others suing with him, notwithstanding the renunciation by him of the infeftment, and a decree of reduction, pendente lite, against the other heirs; — and, (3.) That these objections were pleadable by the defenders, although not heirs of entail.

WILLIAM DICKSON, proprietor of the estate of Kilbucho, had three sons, John, David, and Michael. In 1733 he executed a disposition of his estate in favour of John and the heirs male of his body, whom failing, the other heirs male of his own body. This destination was accompanied by a prohibition against altering the order of succession, but not by irritant or resolute clauses. On the 17th of February 1762 he executed an unlimited disposition in favour of John, and died upon the 8th of March. John made up titles to part of the lands by Crown charter, proceeding on the disposition of 1733, to part under his father's marriage contract, and the rest (embracing the barony of Culter) he possessed on apparency. He himself acquired in fee simple five acres of land in that part of Edinburgh now called York Place. John had no issue, and his heir at law was his younger brother David, who had several

Oct. 1, 1831.

1st Division.
Lord Eldin.

Oct. 1, 1831.

children, the eldest of whom was William, afterwards General William Dickson. On the 11th of June 1767 John disposed his whole estates to trustees for various purposes, but particularly to discharge his debts, pay an annuity of 100*l.* to David, and settle provisions of 1,000*l.* on each of David's younger children; and declaring, that if the trustees sold any part of the lands for these purposes, they should retain possession of the rents of the residue till they had a sufficient fund for purchasing other lands in place of them. He further appointed them not to dispose of any part of his paternal succession unless absolutely necessary, and, on the purposes of the trust being accomplished, to denude in favour of "the said William Dickson, or the eldest son of my
" said brother Mr. David Dickson, who shall be alive at the
" time, and the heirs male of his body; whom failing, to the
" other sons of my said brother David according to their
" seniority, and the heirs male of their bodies respectively;
" whom failing, to the sons of my said brother Dr. Michael
" Dickson, seriatim, according to their seniority, and the heirs
" male of their bodies respectively," and that under such burdens, restrictions, and limitations as he should appoint by a writing under his hand. He died in December 1767, without having executed any such writing. His brother David, being thus excluded by the trust-deed, adopted legal measures for having it set aside; and in 1769 the estates were sequestrated by the Court of Session, on a petition by the trustees.* These proceedings were abandoned in consequence of an arrangement under which, while David ratified the trust-deed, a submission was entered into between him and his son General William to certain arbiters. Neither the trustees nor the substitute heirs were parties to this submission. The arbiters were authorized to appoint such parts of the estates to be sold as they might think necessary for payment of the debts, to settle the provisions to be payable to the younger children of David, and to determine "in what manner, to what series of heirs, and under what
" burdens, limitations, conditions, prohibitory, irritant, and
" resolute clauses, the said lands and estate, or what part
" thereof may remain unsold, shall be settled," and in general to do whatever might be necessary "for the interest of the said

* See Hyndford and others v. Dickson, Dec. 5. 1769 (14,947).

“ parties, and a final and amicable settlement of their whole
 “ family affairs.” Under an interim order of the arbiters,
 David executed a disposition of the estates in favour of the
 trustees, who were thereupon infeft. He and General William
 then acquired right to the debts due by John, of which all the
 creditors, with one exception, executed discharges. For the
 security of these creditors they granted heritable bonds over
 the barony of Culter and the five acres in York Place, and at
 the same time disposed these lands to Mr. Boswell as trustee
 for the creditors, with power to him to sell them for payment of
 John’s debts. They also granted a bond of relief to the trustees,
 to protect them against the claim of the creditor who had not
 discharged his debt.

Oct. 1, 1831.

After these arrangements were concluded, the arbiters, on the
 11th of August 1775, pronounced a decree arbitral, by which,
 “ being desirous to preserve for the family such parts of the
 “ estate as the situation of affairs will permit,” they “ decerned
 “ and ordained the said Mr. David and William Dickson, for
 “ their respective rights and interests, on or before the 1st of
 “ October next, to execute a tailzie and strict settlement of the
 “ lands and barony of Kilbucho in favour of the said Mr. David
 “ Dickson in life-rent, and the said William Dickson and the
 “ heirs male of his body in fee; whom failing, to the others
 “ mentioned in a scroll of the said tailzie signed by us, of the
 “ date hereof, as relative to this decree arbitral, and with and
 “ under the whole conditions, provisions, clauses prohibitory,
 “ irritant, and resolute, contained in the said scroll;” but
 they declared that the life-rent of David should be burdened
 with an annuity of 250*l.* to his son General William, and that
 they should grant a joint bond to the younger children * for
 payment of certain provisions. On the same day the trustees
 denuded in favour of General William and the series of heirs
 mentioned in the trust-deed, and he was thereupon infeft. He
 then, upon the 27th of January 1776, executed the entail agree-
 ably to the scroll referred to in the decree arbitral. It pro-
 ceeded upon the narrative of John’s trust-deed, the measures
 taken by David to set it aside, the arrangement and relative

* These younger children were, John, a member of the Faculty of Advocates,
 David, a clergyman, and two others.

Oct. 1, 1831.

submission, the discharges by John's creditors, and the decree arbitral ; and then the dispositive clause was thus expressed :—
 “ Wit ye me, therefore, in implement of the decree arbitral
 “ and other writs above narrated, and for carrying the intention
 “ of the said deceased John Dickson, my uncle, into further
 “ execution, to have given, granted, and disposed, like as I, &c.
 “ give, grant, and dispoise to and in favour of the said David
 “ Dickson my father in life-rent, during all the days of his life-
 “ time, for his life-rent use allenary, and to myself and the
 “ heirs male of my body in fee ; whom failing, to Mr. John
 “ Dickson, advocate, my first brother-german, and second son
 “ of the said David Dickson my father, and the heirs male of
 “ his body ; whom failing, to David Dickson, my next brother-
 “ german, and third son of my said father, and the heirs male
 “ of his body ;” whom failing, to certain other heirs. This
 deed was fortified by all the clauses of a strict entail ; but it was
 declared, that as the lands were liable for the debts of his
 grandfather William, his uncle John, and his father David, and
 of the General “ himself, preceding the date hereof,” (all of
 which were declared real burdens,) therefore it was provided,
 “ that if the prices of the said lands, and of five acres of ground
 “ in the New Town of Edinburgh, disposed by my said father
 “ and me to the said Thomas Boswell, shall not be sufficient for
 “ paying the whole debts and provisions aforesaid, then and in
 “ that case it shall be lawful to and in the power of me the
 “ said William Dickson, or the heir possessing the said estate
 “ for the time, and likewise to any of the other substitutes
 “ hereby called to the succession, to bring an action before the
 “ Court of Session for selling by public roup such parts of the
 “ said lands and barony of Kilbucho as can be sold with least
 “ prejudice to the remainder, and shall be necessary for paying
 “ such of the said debts and provisions as shall remain unpaid,
 “ after due application of the prices of the other lands and
 “ subjects above mentioned.” There was also a clause that the
 heirs should possess in virtue of the entail, and on no other
 title. The entail was recorded on the 15th of February 1776,
 and in June a Crown charter was expedite in terms of it, and
 sasine immediately taken and recorded.

Prior to this sasine an heritable bond was granted over the
 lands by General William to his brother John (the advocate),

Oct. 1, 1831.

and the other younger children for their provisions, on which they were infest. Thereafter the lands of Culter and the five acres in York Place were sold for payment of the debts, but it was alleged that the proceeds were insufficient for that purpose. David died in April 1780, whereupon General William took possession in virtue of his infestment under the entail; and in 1784 he, with concurrence of his brother John as his commissioner, brought an action before the Court of Session, founded on the above clause in the entail, against John for his own interest, and as administrator in law for a child then alive, and also against other heirs substitutes, several of whom were in pupilarity. After setting forth the terms of the entail, the insufficiency of the proceeds of Culter and the five acres to pay the debts, and the necessity of selling part of the entailed lands, the summons concluded that General William should be found empowered to do so; that a proof should be taken of the amount of the debts, and of the lands proper to be sold, and that they should be declared free from the fetters of the entail. No appearance was made for any of the defenders; but John Dickson acted as commissioner and counsel for his brother the General, having, as was alleged, as well as the other brothers, an interest to have the lands sold, so as to get payment of their provisions, on which there was a large arrear of interest. No tutors ad litem were appointed to the pupil children; and appearance having been attempted for two sons of Dr. Michael Dickson, who resided in England, an objection was made that they had not sisted a mandatory, and they did not subsequently appear. After some procedure, the Court, on the 11th of December 1784, found, that the debts condescended on had been contracted prior to the entail, that in virtue of the reservation it was competent to sell part of them, appointed the lands of Mitchelstone, &c. to be sold, and ordered that the sale should be reported, and the surplus price applied in the purchase of other lands, agreeably to the entail. At this time nothing was done under this authority; and General William, conceiving (agreeably to the then recent decision in the case of Agnew of Sheuchan) that the whole lands were liable for payment of his debts, and being greatly embarrassed, executed a disposition in July 1785 of the estate of Kilbucho in favour of John Loch, as trustee for his creditors. An action of declarator,

Oct. 1, 1831.

at the instance of him and Mr. Loch, was then brought against the heirs of entail and their respective children, concluding to have it found that the lands were attachable for the debts of the General then due, and that Loch was entitled, under his disposition, to sell them for payment of these debts. Appearance was made by his brother John, and some of the other nominatim heirs substitutes, but none for the minor children of these substitutes. During the dependence of this process, and before any judgment was pronounced, the lands of Mitchelstone, &c. which had been authorized to be sold, were exposed by public roup, and purchased on the 31st of January 1786 by the late William Cuninghame; and on the 5th of February thereafter another part of the estate called Parkgatestone, not comprehended in the conclusions of the first action, was purchased by private bargain also by Cuninghame. To ascertain the validity of the sale, he presented a bill of suspension of a threatened charge for the price of the lands last sold; and this having been reported, along with the action of declarator, at the instance of the General and his trustee, on informations to the Court, (one of the informations being for John Dickson and the heirs substitutes who had appeared,) their Lordships, on the 10th of March 1786, repelled the defences, and found and declared in terms of the libel, and remitted to the Lord Ordinary to refuse the bill of suspension presented by Cuninghame.*

* See Mor. 15,534. The following notes of the opinions of the Judges were laid before the Court of Session by the pursuers:—

Lord Swinton. — Clear that no person can bind up his estate against his own creditors.

Lord Justice Clerk.—No man can make a deed to hurt prior creditors, but there is a difficulty as to future contractions. This requires very serious consideration.

Lord Eskgrove.—I am much diffculted, laying aside the decision in the case of Sheuchan, and I do not see that it established law in every case. Clear the act 1685 applies not to the maker of an entail, but to heirs only; and if the fetters were laid only on the maker, it could not be registered in the record of tailzies, or thereby have more effect than it had aliunde. The question is, whether such a settlement as the present may not be good, independent of a statute? The rule of law is, that no man can hold an estate which is not affectable by his debts, and therefore by the act 1685 the right of the contravener must be resolved. Here there is a resolute clause. There are two other modes in which a man may tie up his estate against creditors. He may dispoise the fee, and only reserve a life-rent, or he may interdict himself. A voluntary interdiction will be effectual, even on false grounds, though a man be not so weak and facile as he calls himself. This Court must proceed on

In consequence of this judgment Cuninghame paid the price of the lands which he had purchased, and received a disposition from the General and his trustee Loch, and which John and two

Oct. 1, 1831.

good grounds, but both interdictions equally effectual. The arbiters in this certainly thought the deed they ordered would have some effect, and John Dickson seems to have intended an entail. I would incline to have a hearing in presence.

Lord Braxfield.—If this were a new case, notwithstanding the urgency of circumstances, I would join your Lordships in wishing a hearing in presence; but the precise same point was determined in the case of Sheuchan. I was for the judgment then pronounced, and am still of the same opinion. Tailzies were no doubt made before 1685, and some of the largest estates in this country are held under these deeds; but the House of Lords have properly found (contrary to a judgment of this Court) that these entails are not effectual unless registered according to that act, and no tailzie can be valid but upon that statute. The arbiters here designed no doubt to bind up this young man, and they meant well; but they did not take the right way. They should have restricted his right to a life-rent, for so long as he holds the property his debts must affect it. The other case of an interdiction the law allows to protect those who are weak and facile; but if a man prove himself otherwise he may reduce that limitation of his right. Besides, a man's deeds, even under interdiction, are not set aside, unless lesion is proved. Another man may give me his estate under limitations, and I must take it sub modo as he pleases to give it; but if once the fee-simple is in my person, no deed, while that remains, can cut out my creditors. The act 1685 is the rule by which every entail is to be determined; but every line of that act is repugnant to the idea of a person holding property not affectable by his debts. Accordingly, no prohibition to contract debt, nor even an irritancy of debt, is sufficient; there must at the same time be an absolute resolution of the right of the debtor. It is now trite law, that without a resolute clause no entail can be effectual against creditors. By the act 1685 the next heir serves to him who was last infeft, passing by the contravener, that he may not be liable for his debts. This can never apply to the maker himself, for if you pass by his right, the right of the heirs must cease of course. This is the idea of the common law, sanctioned by the act 1685. There is another idea—a man cannot bind himself to his own heir, so as to prevent him contracting debts, or granting other deeds; the heir, being eadem persona cum defuncto, necessarily becomes liable for his predecessor's deeds as his own. The same principle applies here as in testaments, voluntas est ambulatoria usq. ad mortem. With respect to the submission here, William Dickson need not have entered into it but as he pleased. As to John Dickson's intentions I can say nothing, as he did not execute them. The decree arbitral makes no difference.

Lord Justice Clerk.—After recollecting the case of Sheuchan, and the principles, as now stated, on which it proceeded, I am of the same opinion.

Lord Henderland.—For the judgment in Sheuchan's case, and of the same opinion now. A man's property can only be secured from creditors in the two ways which have been mentioned.

Lord Hales.—I would wish extract to be superseded, as this is a case of some difficulty and importance.

The parties desired extract not to be superseded; upon which the lords repelled the defences in the declarator, and refused the bill of suspension at Mr. Cuninghame's instance.

Oct. 1, 1831.

of the other heirs substitutes subscribed as consenters. On this deed Cuninghame was infeft, and obtained from these heirs substitutes a supplementary disposition, on which he was likewise infeft. The General having again got deeply involved in debt, an arrangement was entered into between him and his brother John, (who was the next heir substitute,) by which it was agreed that certain additional parts of the estate should be sold, and that the General should execute a new deed of entail of the residue in favour of John and a series of heirs. Accordingly, in February 1809, the General agreed to sell part of the estate called the Main's Mill and Mill lands of Kilbucho to Mr. John Hay Forbes, advocate, (now Lord Medwyn,) of which he and his trustee Loch executed a feu disposition on the 24th of May thereafter, and at the same time disposed the whole other lands of Kilbucho to Mr. Forbes in real warrandice. Upon the 28th of April of the same year the General executed an entail, proceeding on the narrative of that of 1776, that he had sold a considerable part of the estate, and had exposed himself to a declarator of irritancy at the instance of his brother John, but that John had agreed not to object to the sales, nor to raise such a declarator, on condition of executing the new entail; and therefore he disposed to himself in life-rent allenary, and to his brother John in fee "and the heirs male of his body; whom failing, to the heirs female of his body;" whom failing, the other heirs called by the entail 1776; with this difference, that the heirs female were by that deed postponed to the heirs male of all the nominatim heirs substitute, whereas by this new deed their heirs female were called immediately after their respective heirs male. From this deed there was excepted the feu-right of the lands which had been sold to Mr. Forbes.

Thereafter, in 1814, the General, along with Messrs. Hotchkis and Tytler, W. S. (who had succeeded Mr. Loch as trustees for his creditors), brought an action of reduction of the entail 1809, mainly on the ground that it had been obtained by his brother John by fraud and deception, which he explained to have consisted in representing that he was liable to a declarator of irritancy, whereas he alleged that he had the absolute disposal of any part of the estate, without being subjected to any such penalty. At the same time he executed a minute of sale of the estate to Tytler, who brought a suspension; and defences

Oct. 1, 1831.

having been lodged for John Dickson, and the cases having come before Lord Balgray, his Lordship, on the 6th of July 1813, pronounced this interlocutor:—"In respect that the pursuer and charger asserts and maintains that he was unlimited fiar of the estate of Kilbucko, and had the right of disposing thereof as he thought proper—1st, finds, that, so far as he is concerned, he had power to execute the deed of entail dated 28th April 1809; 2d, finds that the said entail is a delivered deed, and irrevocable; and that the pursuer has conveyed away the right of fee, and has restricted his right to that of life-rent allenarly; 3d, finds that no legal, just, or reasonable ground is assigned by the pursuer or suspender for setting aside the said bond; therefore in the process of reduction assoilzies the defender, and in the suspension suspends the letters simpliciter." To this interlocutor his Lordship adhered on the 16th of November 1813, "in respect, 1. That it does appear that the execution of the deed of entail 1809 was, under all circumstances, a measure highly proper, prudent, and expedient on the part of the pursuer. 2. That it is admitted by the pursuer that he voluntarily executed said entail, and had power to do so; and that there does not appear from the tenor of the deed itself, or any collateral circumstance, any foundation for the allegation that the pursuer was improperly or fraudulently induced to execute said deed; and that the present proceedings seem to arise rather from a change of mind on the part of the pursuer, than the discovery of any facts attending the execution of the entail 1809."

The case having afterwards come before Lord Alloway, his Lordship reported it to the Court; and Tytler having withdrawn his suspension, their Lordships, on the 2d and 28th of June 1814, assoilzied the defender from the whole conclusions of the action of reduction, and found and decerned in terms of Lord Balgray's interlocutors of 6th July and 16th November last; and found expenses due.

On the 18th of May 1815 the General died; and on the 2d of June, his brother John, in virtue of the entail 1809, expedite a Crown charter of resignation. By this time he had several children, and his eldest son David had been admitted a member of the Faculty of Advocates in 1815. In September

Oct. 1, 1831. of that year John conveyed the fee to David, and they were thereupon infeft for their respective rights of life-rent and fee. In virtue of this title David was enrolled as a freeholder of the county of Peebles, and as such he voted, at the elections of 1818 and 1820, in favour of the successful candidate.

In the meanwhile Hotchkis and Tytler, as trustees for the General's creditors, had entered an appeal against the judgment sustaining the entail of 1809 ; but the House of Lords affirmed it on the 19th of July 1820, with costs.

In 1822 David Dickson, along with his brother Alexander, and two of the next nominatim heirs substitute, brought an action of reduction and declarator against John, and also against John Cuninghame, advocate, son of William Cuninghame, and Lord Medwyn, founding on their rights as heirs substitutes under the entail 1776, and concluding for a declarator of irritancy and forfeiture against John, and decree of reduction of the sales to William Cuninghame and Lord Medwyn, as made in violation of the entail 1776. The grounds on which these conclusions rested were chiefly, that the entail 1776 was an onerous deed, so that it was incompetent for the General to sell any part of the estate, except for payment of the debts mentioned in it ; that the proceedings in 1784 and 1786, under which the sales were made to William Cuninghame, were collusive, irregular, in absence and to the lesion of the parties having the true interest to oppose them ; that those heirs for whom appearance was made were creditors of the General, and as such had an interest to have the lands sold ; and that the sale to Lord Medwyn had been made without any sort of authority.

No appearance was made by John Dickson ; and after the production had been satisfied, great avizandum made, and a remit to discuss the reasons of reduction, parties were heard before Lord Mackenzie, and memorials ordered, in which the whole case was argued. Cuninghame confined himself to the merits, and rested mainly on a plea of *res judicata* afforded by the judgments in the declarator and suspension in 1784 and 1786 ; but Lord Medwyn further maintained, that as David Dickson had made up titles under the entail 1809, which was in opposition to and a contravention of the entail 1776, he had not a title to insist in the present process, which contained a

Oct. 1, 1831.

conclusion, that on the sales being set aside, and decree of forfeiture pronounced against his father, it should be found that he had right, under the entail 1776, to the lands; that besides, by availing himself of the entail 1809, and exercising the rights of a freeholder, he had homologated both that deed and the sale to Lord Medwyn, which was expressly mentioned in it; and that as the conclusions in favour of the other pursuers were dependent upon the success of David, the action must be dismissed. Lord Eldin, on advising the memorials, (10th July 1824,) “repelled the reasons of reduction, assoilzied the “defenders from the conclusions of the libel,” and found them entitled to expenses.

Against this judgment the pursuers presented a petition, but no petition was presented by the defenders. On advising the cause, the Court, considering that the principle of the case of *Sheuchan*, then recently decided in the House of Lords, was brought into discussion, and that it would be proper to have the opinions of the whole Judges, made a remit accordingly. In consequence of this remit the Judge of the second opinion returned the subjoined opinion.*

* *Lords Justice Clerk, Glenlee, Robertson, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie, and Eldin*,—Having considered the summons and printed pleadings of the parties in this case, we are of opinion that the action cannot be maintained, in respect of the form and structure of the summons. That instrument, after concluding for reduction of the various decrees, interlocutors, judgments, charters, and writs therein set forth, concludes, that it shall be “found and declared by decree foresaid that the “pursuers and the other heirs of entail in the order set down in the said deed of “tailzie, have the only good and undoubted right and title to the hail foresaid “entailed lands and estate, and others which were sold as aforesaid,” &c. “And “further, it should be found and declared by decree foresaid that the said John “Dickson, the heir of tailzie to whom the succession opened on the death of the said “William Dickson, has, by the various acts and deeds of contravention above set “forth, or one or other of them, incurred an irritancy in terms of the resolute “clause in the said entail, and has for ever lost, forfeited, and amitted all right and “title to the said entailed lands and estate; and that his right, title, and interest “therein has been, since the death of the said General William Dickson, is now, and “shall be in all time coming, void and extinct; and that the said entailed lands and “estate did at the date foresaid fall, and have now fallen and devolved, to the said “David Dickson first above named, being the eldest son of the said John Dickson, “and the next substitute called to the succession by the said deed of entail, and the “other substitutes in their order; and that the said David Dickson and the other “pursuers as aforesaid have accordingly the sole right to possess and enjoy the said “lands and estate,” &c. Such being the most important and primary conclusion of

Oct. 1, 1831.

A minute was then lodged by David Dickson, stating that on 12th January 1824 he had executed a renunciation of the infestment under the entail 1809 ; and he afterwards gave in another minute, stating, that although the sasine in his favour was

the action, in order to see that it cannot be maintained, it is only necessary to attend to the situation in which the leading pursuer David Dickson confessedly stands. It appears that, in consequence and in consideration of the last sales of the estate of Kilbucho, William Dickson executed a deed on the 24th April 1809, conveying the remainder of that estate to himself in life-rent, and Mr. John Dickson in fee ; whom failing, to a series of heirs differing from those contained in the entail 1776 ; the validity of which deed was afterwards sustained in this Court in a question between General (William) Dickson and the trustees for his creditors, and his brother Mr. John Dickson, and the judgment was affirmed on appeal. It is also an admitted fact, that, after General Dickson's death, Mr. John Dickson made up a title under the deed 1809, and propelled the succession under it by conveying the fee thereof to his son, the pursuer David Dickson, who was infest, has been enrolled as a freeholder, and is now actually in possession under that title.

In these circumstances it appears perfectly manifest that Mr. David Dickson, standing infest in the fee of the remainder of the estate under titles importing a clear contravention of the entail 1776, which likewise expressly required the whole heirs of tailzie " to possess and enjoy the lands and estate hereby disposed in virtue of this " present tailzie, and infestments to follow thereupon, and by no other right or title " whatsoever," cannot maintain a reduction founded on that very entail, and a declarator of contravention against his father. If his father has contravened, he himself stands in the same situation, and is equally barred from insisting in the conclusions of the present summons that the sales under reduction should be set aside, and the lands restored to him. But, independently altogether of this objection, as David Dickson is at this very moment enjoying the benefit of the deed 1809 executed by General Dickson, which, in consideration of the validity of all the prior sales, secured the remainder of the estate to his brother and his descendants by restricting his own interest to a life-rent, he is barred *personali exceptione* from insisting in the present action for setting aside the whole of these prior sales.

We consider it to be no satisfactory answer to the above objection, arising from the nature of the action, that other persons claiming as substitutes under the entail 1776 are associated with David Dickson as pursuers. We hold it to be clear, that if David Dickson, the leading pursuer, is not entitled to maintain that the estate has devolved upon him, no other person can insist in either the reductive or declaratory conclusions for his benefit ; and as to the individual interests of the other substitutes of entail to insist in the conclusions of the action, to the effect of having it declared that the estate has devolved upon any of them, it is altogether incompetent under the present summons. As it appears, upon their own showing, that it was considered necessary to declare the forfeiture of Mr. John Dickson, it must be equally necessary for them to take the same step with regard to his son before the right of any other substitute can be declared ; but that is certainly a proceeding altogether incompetent under the present summons. We are therefore of opinion that the action ought to be dismissed, and that it is unnecessary to give any opinion on the other points argued in the pleadings.

written upon nine pages, the notary's docquet set forth that it consisted of only eight, and therefore the sasine was null and void. He also raised a reduction of the sasine, in which he got decree in absence against the other heirs. On resuming consideration of the case, and it having been ascertained that there had been an irregularity as to the form of consulting the Judges, the Court appointed the parties to lodge cases on the subject of the title. This having been done*, a minute was thereafter given in by Cuninghame, stating that he waived all objections to the title, and requested their Lordships to determine the merits of the reduction. Oct. 1, 1831.

The parties were then ordered to lodge questions, with the view of consulting the other Judges; which was accordingly done, and remitted to their Lordships along with a separate class of questions proposed by the Court, which will be found embraced in the subjoined opinions of the Judges.†

* The nature of the pleas maintained by the parties will be seen from the queries put to the Judges, and their opinions.

† *Lords Justice Clerk, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie, and Newton*, returned this opinion:—On considering the whole of this case, we will advert to the questions by the Lords of the First Division, because in answering them we shall fully exhaust those put respectively by the parties.

Q. 1.—Whether the interlocutor of the Lord Ordinary is to be regarded as a final judgment, virtually sustaining the pursuers' title against either or both of the defenders, Mr. Cuninghame and Lord Medwyn?

A.—We are of opinion that the interlocutor of the Lord Ordinary cannot be considered as a final judgment virtually sustaining the pursuers' title. We do not consider the objection to the title as a dilatory defence, because a defence of that sort only delays the cause; it prevents it from proceeding in the shape in which it is brought till something shall be done, or till another summons better libelled shall be brought; but the objection to the title in this case, if good, appears to us to involve in itself a defence on the merits, as the pursuers can never sue to the same purpose in any other action. We imagine that the Lord Ordinary has been of the same opinion, and therefore assoilzied the defenders in general, whereby we cannot know whether his judgment was founded on the objection to the title alone, or on the merits; and therefore we think that both are open to discussion.

Q. 2.—Whether the infeftment in 1815 was valid, and whether the pursuer David Dickson thereby incurred an irritancy under the entail 1776?

A.—To us there appears to arise out of this question a view of the cause which has not occurred to the parties, but which is one involving in itself both title and merits inseparably; and it is this, that the entail 1776 has been recalled, and the investiture under it annulled by a new one being taken, which has been found to be valid both in this Court and by the House of Lords, and which stands unreduced at this hour. This requires some detail.

Oct. 1, 1831.

When the case again came before the Court, the pursuers stated, that as a new plea had been suggested by the Judges,

General Dickson executed the entail 1776, which contained a power to sell lands, by authority of this Court, for payment of debts contracted prior to the entail, and accordingly lands were sold to Mr. Cuninghame at the price of 7,200*l.*; and although objections are stated to the formalities observed in that action for selling lands, we consider these to be trifling and unavailable. About that time the judgment was pronounced in the case of Agnew, whereby this Court found that a man cannot entail his estate on himself as institute, so as to restrain himself from contracting debt, payment of which may not be made effectual against his estate. General Dickson, regardless of his entail, had incurred considerable debts; and judging that what was law for Agnew was also law in his case, he appointed the late John Loch of Rachen, esq., factor and trustee for himself and his creditors, by a trust disposition dated the 8th of February 1785. Accordingly they raised an action for having it declared that they were at liberty to sell parts of the estate for payment of the debt contracted posterior to the tailzie 1776; and, before any decree was pronounced in that cause, they made a second sale to the predecessor of the defender Mr. Cuninghame of Lainshaw at the price of 1,100*l.* In addition to the declarator, that gentleman raised a process of suspension of a threatened charge for payment of the price, which two actions were conjoined; and this Court, proceeding on the principle that General Dickson could not entail his estate against his debts, pronounced decree in the declarator, and found the letters orderly proceeded in the suspension; and thus part of the lands in the tailzie 1776 was taken out of the investiture by a posterior one.

Relying on his powers, thus found by this Court to be competent to him, General Dickson contracted more debt, for payment of which the sale of the dominium utile of lands was made to Lord Medwyn; and by his infestment these were also taken out of the tailzied investiture 1776, leaving the dominium directum still as part thereof, burdened with the feudal right in favour of Lord Medwyn; and General Dickson's brother, John Dickson, esq. advocate, being afraid that the whole family estate might be squandered away, entered into the transaction detailed in the pleadings, by which the General, on the 24th April 1809, executed a deed of entail, divesting himself of the fee of the remaining estate by disposing it to himself in life-rent for his life-rent use allenary, and to the said John Dickson and the heirs male of his body in fee; whom failing, to the heirs female of his body; whom failing, in his next brother and the heirs male of his body; whom failing, to the heirs female of his body; and so on through the course of succession, preferring the heirs female of the several heirs in their order to the next.

General Dickson still persisted in his course of extravagance; and supposing that he was not restrained by the second entail 1809, more than he had been by that in 1776, he brought an action in his own name and that of the trustees for his creditors against his brother and the whole heirs under the tailzie 1809, who were also heirs under that of 1776, though in a different order, for setting aside the entail 1809. In that case Lord Balgray, as Ordinary (6th July 1813) pronounced an interlocutor, in which his Lordship, "in respect that the pursuer and charger asserts and maintains that he was unlimited fiar of the estate of Kilbucho, and had the right of disposing thereof as he thought proper,—1st, finds that so far as he (General Dickson) is concerned, he had power to execute the deed of entail dated 28th April 1809; 2d, finds that the said entail is a delivered deed, and irrevocable; and that

which had not been noticed by the parties, they were entitled to be further heard ; and the Court accordingly ordered

Oct. 1, 1831.

“ the pursuer has conveyed away the right of fee, and has restricted his right to that of life-rent allenarly.”

The General then pleaded that he had been fraudulently misled to execute the entail; but the Lord Ordinary repelled that plea, and adhered to his interlocutor (16th Nov. 1819).

The case then went before the First Division, when the Court (3d June 1814) assolizied the defender, “ and find and decern in terms of Lord Balgray’s interlocutors of the 6th July and 16th November last.”

Here, then, there was an action brought for setting aside the entail 1809, in which the judgment of the Court was expressly that General Dickson had power to execute the deed of entail 1809; and the judgment was affirmed by the House of Lords, with costs, in 1819, at which time the defender David Dickson had been four years at the bar, and stood infeft in the fee of the estate under that entail; for General Dickson having died in 1815, after the judgment had been pronounced against him, his brother John, who had been previously infeft in the fee, propelled the succession to the estate to the pursuer David Dickson by conveying to him in fee the superiority of the lands in the tailzie 1809, comprehending the superiority of Lord Medwyn’s lands, reserving his own life-rent; and on this both father and son were infeft for their several rights of life-rent and fee; and both were placed on the roll of freeholders for the county of Peebles, on which they stood for many years.

Thus there is a direct finding of this Court that General Dickson had power to execute the tailzie 1809, and that had been affirmed by the House of Lords in 1819. The tailzie 1776 contained a different order of succession from that in 1809; it contained a provision, too, that the heirs should possess under it, and it alone; yet it is finally decreed that the General was not bound to possess under it. It has been virtually recalled, and a new investiture made on a posterior deed found to be valid in the Court of the last resort, which could not have been executed if the tailzie 1776 had been in force. And although the entail 1809 did not contain or even make allusion to the lands sold to Mr. Cuninghame, the first sale was warranted by the tailzie 1776 itself; and the same powers which authorized the General to recall that tailzie must have enabled him to make the second sale to that gentleman, which was ratified by the Court. The other part was also taken out by the sale to Lord Medwyn; and the remainder, including the superiority of Lord Medwyn’s lands, was put under a totally new investiture, which stands in force at this moment. The conclusion that we draw is this, that the tailzied investiture 1776 is annihilated; in particular, that the sale of the lands to Lord Medwyn is ratified by the right to the dominium utile of them being excepted in the tailzie 1809; that neither John Dickson the father, nor his son the pursuer, has incurred an irritancy under it; and that the latter and the other pursuers have no right to found on it, whereby the title on which they libel is a nonentity, and they must continue to abide by the tailzie 1809 in so far as concerns Lord Medwyn; and as to Mr. Cuninghame, his acquisitions are secured to him by judgments of this Court, against which there is no power of appeal. The pursuer David Dickson now says that his infeftment of the fee of the subjects in the tailzie 1809 has been reduced by a decree in absence by this Court. But this is of no avail, since, allowing every effect to that decree, the only consequence is, that his

Oct. 1, 1831. additional cases, " in respect the consulted Judges are of
 " opinion that the tailzied investiture 1776 is annihilated, and

father's infeftment on that deed remains in full force, whereby the investiture was completed, which altered that on the tailzie 1776.

2. Supposing that the foregoing is a mistaken view of the case, (of which we are not sensible,) and that the tailzie 1776 has not been virtually recalled, we are clear that the pursuer David Dickson, by accepting a right under the tailzie 1809, and infefting himself thereon, did incur an irritancy under that of 1776, in so far as he possessed on a different title from the latter entail, and one, too, altering the order of succession in it.

Q. 3.—Whether the irritancy, supposing it to have been incurred, has been purged?

A.—The pursuer David Dickson's infeftment of fee has been set aside by a decree in absence, which is only a recent measure, indicating that the whole pursuers understand each other, and allow temporary expedients to be tried to support their cause. We do not feel ourselves called on to say what effect this might have had if that step had preceded this action; but as this summons was raised, and the action decided in a contrary predicament of fact, we do not think that this ought to make any difference.

As to the renunciation of the right of fee, the least knowledge of feudal law must at once determine that it cannot take away a right of fee subsisting in the pursuer's person. Nothing short of a reconveyance, and that followed by sasine, on a charter of resignation or confirmation by the Crown, can divest the pursuer.

3. As to the sasine being null, owing to the notary's docquet mentioning that the instrument consisted of nine pages, we can pay no regard to such a plea. It is true that acts of parliament require the leaves, and an act of sederunt requires the pages, to be numbered 1st, 2d, 3d, &c., and that the notary's docquet shall mention the number of pages of which the sasine consists; but if the pages be numbered, and there be an innocent graphical or clerical error in the docquet, specifying the number of pages, which is demonstrated to be a mere clerical error both by the enumeration of the pages and the fact detailed in the docquet, none of the fore-mentioned acts, says the sasine, shall be null. Now each of the pages of the pursuer's sasine is numbered; and in his docquet the notary attests that there is an erasure in the seventeenth line of the eighth page, being the same on which the docquet is written, thereby proving that the word " octo " in that docquet is a clerical error for " septem." Indeed the Act of Sederunt, 17th January 1756, goes beyond the statute 1686, c. 17.

Q. 4.—Whether it is not *jus tertii* to the defenders to plead the irritancy, supposing it still to subsist; and whether they can plead it by way of exception?

A.—We are of opinion that the defender Lord Medwyn can plead the irritancy, and by way of exception. He stands in the right of General Dickson, whose absolute warrandice he possesses, and whose conveyance he holds in real warrandice to the very subject possessed by the pursuer in fee. Suppose that General Dickson had been alive, and the pursuer had raised against him a declarator of irritancy, founding on the tailzie 1776, it certainly would have been competent to the General to say to the pursuer, " How can you accuse me of a contravention of that entail, when you yourself " have set it at nought by possessing on a different deed, altering and virtually re-

“ that the entail executed on the 18th of April 1809 has
“ been sustained by final judgment of this Court, and in the

Oct. 1, 1831.

“ voking the investiture 1776?” We think this answer would have been sufficient to stop the action at the pursuer’s instance; and if so, it must be equally competent to any one in right of the General. It would be incompetent to Lord Medwyn to pursue a declarator of irritancy against the pursuer, but it is competent to plead the irritancy by way of exception in bar of this action.

2. We think that the case of M’Culloch, May 17, 1826, decided by the Second Division, is precisely in point with this cause, and proves that the irritancy may be pleaded by exception.

Mr. Dickson, says that Mr. M’Culloch was the heir who had succeeded to the estate of Barholm; that he was the verus dominus, as the pursuer expresses himself; whereas the latter has not succeeded to the estate of Kilbucho, and is not the verus dominus. We consider this to be a mere evasion; he has taken the fee præceptione hæreditatis; he was infeft, and took possession, and was as much the verus dominus of the estate as he will ever be; only that it is burdened with a life-rent to his father, which in the course of nature must cease, leaving the pursuer’s investiture precisely as it stands.

Q. 5.—Whether David Dickson is barred by homologation from insisting in this action?

A.—We think that he is, precisely as much as is his father, against whom he libels to have an irritancy declared. It is undeniably clear that the tailzie 1809 was executed by the consent of the pursuer’s father, who got his brother thereby to divest himself of the fee of the remaining parts of Kilbucho, and who immediately ratified that deed by an investiture on it. After the General’s death the pursuer’s father conveyed the fee to his son, the pursuer, who was infeft therein, and enrolled as a freeholder of the county of Peebles. He is now pleased to renounce this fee, and to get a decree in absence reducing his infeftment. But will these ex post facto acts take away the ratification? Homologation is equal to a direct deed ratifying the act subject to challenge; and if the pursuer had by a deed ratified the tailzie 1809, surely his renunciation, and decree in absence reducing his infeftment, can have no effect. He has ratified a deed altering that tailzie on which he founds, and expressly recognizing Lord Medwyn’s feu-right; and on that ratification Lord Medwyn is entitled to found, as much as the late General Dickson could have done.

Q. 6.—Whether the concurrence of the other pursuers is sufficient to obviate any objection against the title of David Dickson, upon the ground either of irritancy or homologation?

A.—We think that the concurrence of the other pursuers is not sufficient to obviate the objection to the pursuer’s title. The conclusion of their action is, that the right of Lord Medwyn shall be reduced, and that the defender John Dickson shall be declared to have forfeited his right thereto, and that the same shall be decreed to belong to the pursuer David Dickson, who has forfeited, just as much as did his father. The case of M’Culloch, already referred to, is correctly in point; and, with deference, it appears to be inconsistent with justice to forfeit John, and award his estate to David, who has done the same deed that inferred forfeiture against John. Besides, we think that the very tailzie 1776, on which all the pursuers libel, was revoked by a deed which, by the House of Lords, has been decreed to have been within the power of General Dickson to execute, and the investiture 1776 was thereby annihilated.

Oct. 1, 1831. “ House of Lords, and so become the standing investiture of
 “ the estate, whereby the pursuers are deprived of any title to

Q. 7.—Whether the remote substitutes are entitled, supposing the objection to the title of David Dickson to be sustained, to insist in all or any of the conclusions of the action?

A.—We think that this question is answered by what has been already observed on the preceding query.

ON THE MERITS OF THE ACTION.

Q. 1.—Whether the entail 1776 was an onerous deed? 2. Whether (supposing it onerous, or even gratuitous,) it was effectual to secure the estate against the subsequent acts and deeds of the late General Dickson? If so,

Q. 3.—Is Mr. Cuninghame's defence against the conclusions of the action in regard to the land comprehended in his father's purchase well founded—1. Upon the plea of *res judicata*; or, 2. Upon the merits of the proceedings in the action 1784?

A.—We unite all these queries, because we think they may be all answered at once. We think that the deed 1776 was beyond doubt onerous. None of the judges entertained doubts of its onerosity in 1784, when the question was agitated whether it was effectual or not; they only said that in point of law it was ineffectual, because General Dickson entailed the estate on himself, which, in their opinion, ought to have been done by the trustees, and not by the General. But, with regard to the lands sold off at the first sale to Mr. Cuninghame, that was done in conformity to a power in the tailzie to sell lands at the sight of this Court. An application was accordingly made to the Court, who granted to the pursuer power to sell certain lands specially described, and of which a rental was proved. The sale was accordingly made by the pursuer in terms of the power given him by the Court; and although it was his duty to report the sale to the Court, as he was ordered to do, his neglecting that duty could not affect the validity of the sale or the right of the purchaser. It is said that John Dickson, and other heirs of entail who had children, were called as administrators in law for their children; but they were interested to betray these children, on which account curators *ad litem* ought to have been appointed, which was not done, and therefore the proceedings quoad them are null. This is carrying matters very far indeed. We cannot discover any jarring interests which existed between the parents and their children—all were alike concerned in preserving the estate. If there were any minutiae erroneous in the procedure, they fall under the rule of law that the objections arising on that ground were competent and omitted, and we are clearly of opinion that the *res judicata* protects Mr. Cuninghame's first purchase.

Q. 4.—Is Mr. Cuninghame's defence against the conclusion of the action, in regard to the lands comprehended in his father's second purchase, well founded on the ground of *res judicata*, or on any other ground?

A.—We are satisfied that it is protected by the *res judicata*, against which all the objections started by the defenders appear to us perfectly groundless. Whether the judgments were right or wrong it is of no importance now to inquire, for they are secured by lapse of time against the power of appeal.

Q. 5.—Is Lord Medwyn's defence against the conclusions of the action well founded on the ground of *res judicata*, or on any other ground?

A.—We do not see that Lord Medwyn can found on any *res judicata*, as there is no action mentioned in the proceedings to which he was a party, or in which the validity of his individual purchase was brought into question. But we have already

“ bring this present challenge, and that the defenders should
“ be assoilzied; a plea in law arises, which hitherto has not

Oct. 1, 1831.

enlarged on an objection to the title of the pursuers, which intimately blends itself with the merits—we mean the plea that the tailzie 1776, on which the pursuers libel, was revoked and altered by the subsequent deed 1809; that the tailzied investiture 1776, in so far as it remained, was annihilated by a new one upon that tailzie 1809; that this was declared to be within the powers of General Dickson, as an unlimited fiar, to do, both by this Court and the House of Lords; that the last investiture is, therefore, the only title which the pursuers have to the estate; and since the General was an unlimited fiar, Lord Medwyn's purchase must be secure to his Lordship.

When we review the whole proceedings detailed in this action, and from them see that the defender John Dickson acted uniformly in conformity to the opinion and judgments of this Court—when we see that the tailzie 1776 was not considered to be binding on General Dickson, and that he was declared to have full power to execute the tailzie 1809, it is inconceivable to us that this Court can declare a forfeiture against him of his right to the estate; and his not opposing such a decree is evidence of a collusion between him, his children, and the other heirs by this action, to attempt to enrich themselves by an act of injustice to the defenders. Let the case of Agnew be admitted to have been well decided in the House of Lords, which we are bound to admit, still that judgment cannot be a precedent in this particular cause, which has precedents of its own. This Court and the House of Lords have both found that General Dickson had power to disregard the tailzie 1776, and execute that of 1809; and whether it is possible for the pursuers to reduce the entail 1809 or not, in spite of the precedents already mentioned, we do not think ourselves entitled to decide. It is sufficient that that entail is the subsisting investiture of the estate, homologated by the pursuers David Dickson and his father, to exclude the former and the other pursuers from founding on the tailzie 1776 in this question with Lord Medwyn; and we are of opinion that on the title, as blending itself with the merits, his Lordship ought to be assoilzied, with full expenses.

Mr. Cuninghame has renounced his objection to the pursuer's title; but it appears to us to be impossible for the Court to pay any regard to such renunciation, since Mr. Cuninghame's case must of course be decided partly on the principles which apply to that of Lord Medwyn. Mr. Cuninghame, no doubt, has the additional plea of *res judicata*, which, we think, is of itself alone sufficient to protect him on the merits; but he ought to be assoilzied from this action, not only on that ground, but on the whole, with full expenses.

Lord Newton subjoined this opinion:—I concur in the foregoing opinion in all that regards the objections to the title of the pursuers.

As Mr. Cuninghame has waived these objections, it becomes necessary in his case to give an opinion on the merits. Here I agree with the other judges, that the first purchase was made in conformity to the power of sale contained in the tailzie 1776, and that no irregularity has been pointed out which can affect its validity. The second sale, I also agree in thinking, is secure from challenge as a *res judicata*.

Being satisfied in Lord Medwyn's case that there is a valid objection to the pursuer's title, I think it unnecessary at present to enter on the consideration of the merits. Both defenders should be assoilzied, with expenses.

Lord Glenlee delivered this opinion:—The disposition of tailzie of 1809 by General Dickson in favour of his brother John, and the heirs therein mentioned, I understand

Oct. 1, 1831. “ been stated by the parties, and upon which they are entitled
 “ to be heard, if they shall be so advised.”

to be inconsistent with and repugnant to the previous tailzie of 1776, and also that it bears an express obligation on John Dickson not to challenge the sales previously made by the general.

The validity of this last entail was sustained in this Court and in the House of Lords in a question between General Dickson and John. Whether it may be challenged at the instance of the pursuers of the present action, I need not consider, because in fact it has not yet been challenged by them. Neither it nor the subsequent charter 1815 is called for in the summons; and although indeed a forfeiture of John Dickson's right under the entail of 1776 is concluded for, yet there is no conclusion for having his right to possess under the deed 1809 also extinguished.

This being premised, it appears to me, in the first place, that as matters stood when the petition and answers came to be advised formerly, the pursuer David Dickson, by accepting and acting in the manner mentioned in the papers under the deed of his father John, propelling to him the succession under the new tailzie of 1809, had lost all title to pursue in the inconsistent character of heir under the tailzie 1776; and, in the next place, it appears to me, that although, his father being still alive, he cannot be said to have incurred the proper passive title of preceptio, yet even now he is debarred from challenging those sales which, by the deed 1809, his father, who has propelled the succession under it to him was expressly bound not to challenge. I think these exceptions also bar the other pursuers from insisting in the libel as laid, because it concludes that the lands of which the sales are challenged should be found to belong to David Dickson. There is no separate and independent conclusion in favour of the other pursuers themselves.

I think that it was competent for the defenders to found on the deed 1809, and on the pursuer's having accepted and used his father's deed propelling the succession as above mentioned, and that the pleas thence arising were available to them by exception; and I see nothing in the Ordinary's interlocutor which barred them from insisting on these pleas in their answers to the pursuer's petition.

As the cause stood, therefore, when the petition and answers came to be advised by the First Division, and a remit, in which I understand there was some informality, was made to the other judges, requiring their opinions, I think that, on the grounds I have stated, the process fell to be dismissed.

With respect to the steps which, in order to obviate the objections stated against him, have been taken by the pursuer David Dickson since the cause was formerly before the First Division, I think it needless to inquire, and indeed I have formed no opinion as to what effect they might have had if taken before the action was raised, or even tempestive before it had made any considerable progress, because I think they were taken at so advanced a period of the litigation, and under such circumstances, that no regard can be paid to them in the present process.

According to the opinion above expressed, I certainly do think it altogether unnecessary to say any thing on the other questions which are discussed in the papers. The remit, however, bears that regard is to be had to Mr. Cuninghame's minute, waiving on his part all objections to the title. Now Mr. Cuninghame has defences peculiar to himself, and distinct from others which apply to both defenders—namely, his plea on the proceedings in 1784, in as far as concerns the first purchase, and his plea of res judicata in as far as concerns the second purchase, and I am of opinion that those pleas are well founded. I think, in expressing this opinion, I

In reference to this new plea, the pursuers (who denied that there was any understanding between them and John Dickson) maintained—

Oct. 1, 1831.

1. That as the object of the action by General Dickson in 1814 was to set aside the entail of 1809, on the ground that it had been obtained by fraud and deception in representing to him that he was bound by the deed 1776, and as the defenders in that action had been assoilzied, it was impossible to found upon the judgment to any other effect than as negating the allegation of fraud; and therefore matters stood precisely as if no such action had been raised, and no such judgment pronounced; and,

2. That as the lands sold to the defenders were specially excepted, and consequently excluded from the effect of the entail 1809, they could not be affected by any judgment pronounced respecting the validity of that entail, but remained subject to the effect and influence of the entail 1776, which therefore, quoad them, was the subsisting investiture.

On the other part, it was contended by Lord Medwyn, that as it was undoubted that the entail 1809 was in direct violation of the deed 1776, and as it was impossible, if the party in possession under the latter of these deeds had not had power to execute that of 1809, the Court could have found that he had so; and as the Court expressly adhered to the judgment of Lord Balgray, finding that “so far as he (the General) is concerned, he had the power to execute the deed of entail dated “28th April 1809;” and as this judgment had been affirmed by the House of Lords, it necessarily followed that the entail 1776, on which this action rested, was annihilated, and consequently the title of the pursuers destroyed.

The case having been again remitted for the opinions of the other Judges, they returned the subjoined opinions.*

sufficiently obey the requisition in the remit in regard to Mr. Cuninghame, and that I am at liberty to abstain from saying any thing at present as to other questions, on some of which I have not in fact made up my mind.

* *Lords Justice Clerk, Glenlee, Pitmilley, Alloway, Cringletie, Meadowbank, and Mackenzie* transmitted this opinion: — We have considered the cases offered for these parties, with the former procedure and remit by the Lords of the First Division to us, with the speech of the Lord Chancellor and judgment of the House of Lords in the Barholm case.

Oct. 1, 1831.

When the case came to be advised, the Judges, with the exception of Lord Craigie, concurred in the subjoined opinion,

In our former opinion we referred to the case just mentioned as a precedent in point, and we have additional reason to be confirmed in our ideas by the affirmance of the judgment therein by the House of Lords.

It is pleaded by Messrs. Dickson that the investiture under the tailzie 1776 was not recalled by that in 1809, in so far as respects the lands sold to Mr. Cuninghame and Lord Medwyn; but we consider this to be a mistake.

In the first place, one of the sales to Mr. Cuninghame was made in virtue of powers contained in the tailzie 1776 itself, and under the authority of this Court; and the second sale to that gentleman was, to a small extent, sanctioned by a judgment of the Court, long ago final, and beyond the reach of challenge even by appeal. There can therefore be no doubt that these sales have annihilated the investiture of 1776 to the length that they extend.

With regard to the sale to Lord Medwyn, the deed of entail by the late General Dickson proceeds on the narrative, that, notwithstanding of the tailzie 1776, he had sold a considerable "part of the said lands and estate (viz. Kilbucho), and thereby become liable to a declarator of contravention of irritancy at the instance of the said John Dickson, which he might now raise against me. But whereas the said John Dickson has, for my accommodation, agreed not to object to the sales already made of part of the foresaid lands for payment of certain debts contracted by me, nor to pursue any action of declarator of irritancy against me, upon condition of my granting the deed underwritten;" he therefore granted the entail 1809, which contained a different order of succession from what was in the deed 1776; and, secondly, it referred to the sale made to Lord Medwyn, as it contained an express reservation of the feu-right granted to his Lordship, and entailed the superiority only of these lands. On this entail Mr. John Dickson was infeft, and in 1815 he propelled the succession to his son David, the pursuer, by conveying to him, inter alia, the fee of the lands that had been sold to Lord Medwyn, with the exception of the feu-right in his Lordship's person; and having disposed to himself in life-rent, both father and son were enrolled in the roll of freeholders for the county of Peebles for their respective rights of life-rent and fee of these lands purchased by Lord Medwyn.

Thus we consider that the investiture of 1776 was recalled, and annihilated also, with respect to the lands sold to Lord Medwyn, as well as those disposed of to Mr. Cuninghame. The deed 1809 ratifies the sales, because it proceeds on the narrative of them, and makes the non-challenge of them the condition of granting the deed; and further, it ratifies the sale to Lord Medwyn, by acknowledging the feu-right in his person, and the pursuer ratified that deed by taking possession under it.

2. We think that the deed 1809 is in contravention of the other in 1776, if the same could be said to be still in existence, for the former contains a different order of succession from that in the latter, and any alteration was prohibited under the sanction of irritancy and forfeiture of the contraveners. It also prohibited alienations of the whole or any part of the estate; it contained likewise a condition that the heirs should possess the estate under that tailzie alone, and by no other right—all under the sanction of forfeiture in case of contravention. But, as already mentioned, the tailzie 1809 ratified the sales made in contravention of that in 1776; and the pursuer and his father both repudiated the deed 1776 as their title of possession, and expressly made up their investitures under the tailzie 1809.

and thereupon the following interlocutor was pronounced:— Oct 1, 1831.

“ The Lords having resumed consideration of the reclaiming
 “ petition for David Dickson, Esq. and others, answers thereto
 “ for John Cuninghame, Esq. and for the Honourable John
 “ Hay Forbes (Lord Medwyn) respectively, and advised the
 “ same, with the summons, defences, and the several mutual
 “ revised cases, and whole pleadings of the parties upon the
 “ merits; and having particularly considered the opinions of
 “ the other Judges consulted therein, in terms of the act of
 “ parliament, in which opinions there is suggested an objection
 “ to the title of the pursuers, founded on an annihilation of
 “ the entail 1776 by the judgment of the House of Lords
 “ sustaining the entail of 1809 as valid and effectual; and
 “ having heard the counsel for the parties in their own
 “ presence; and having also considered the deed of renunciation
 “ executed by the pursuer on the 12th of January 1824, and
 “ recorded in the register of renunciations on the 12th of
 “ March 1824; and having further considered the terms and
 “ conclusions of the summons, and other procedure, particularly
 “ the subsequent opinions of the other Judges consulted in the
 “ whole cause, in terms of the act of parliament; find that the
 “ defender John Cuninghame, Esq. is entitled to take the

Nothing, then, can be clearer than that if the pursuer David Dickson's father had contravened the tailzie 1776, the pursuer had, when the present action was instituted, equally done so. He then stood infest on the entail 1809, and yet he founds on that in 1776, which expressly declares that he shall possess upon it, and it alone, under the penalty of forfeiture. He is therefore in the same situation in which Mr. M'Culloch stood in pursuing a reduction of deeds under an entail which he had repudiated, and must therefore have a similar judgment applied to him.

With regard to the other pursuers, they too are situated precisely as were a number of the pursuers in the case of Barholm. “ They (as the Lord Chancellor observes in that suit) in fact adopt, as far as this cause is concerned, that which is done by Mr. M'Culloch. They adopt his disclaimer, and join in his prayer that the property may be adjudged to the pursuer;” and therefore his Lordship thought that this Court “ were perfectly correct in considering that the situation in which these other pursuers stood did not differ from the situation in which Mr. John M'Culloch himself stood.”

We are of opinion that this judgment is strictly applicable to the present cause. As Mr. Dickson himself has contravened and indeed repudiated the deed 1776 in so many ways, he cannot have any right to claim under it; and the other pursuers, by desiring that he shall forfeit his father, and take the estate, cannot bestow upon him any additional title.

Oct. 1, 1831. “ benefit of the objection which has been suggested as aforesaid
 “ to the title of the pursuers, and sustain the said objection
 “ accordingly: Find, on the merits, that the first purchase was
 “ made in conformity to the power of sale contained in the
 “ tailzie 1776, and that no irregularity has been pointed out
 “ which can affect its validity, and that the second sale is
 “ secured from challenge as a *res judicata*; and so far as
 “ regards the other defender Lord Medwyn, that the entail
 “ 1776 cannot be held as a valid and effectual limitation of the
 “ right of the late General William Dickson, the author of the
 “ pursuer, and repel the reasons of reduction which are founded
 “ on a contravention of the said entail: Find, separatim, that
 “ even if that entail could be held to be the subsisting investiture
 “ of the estate of Kilbucho, the principal pursuer, David Dickson,
 “ Esq., by making up a title, and possessing under the entail
 “ 1809, which is inconsistent with the entail 1776, would be
 “ barred from maintaining any action upon the latter deed,
 “ and that the objection to his title to pursue is in no respect
 “ removed by the renunciation executed by him, or any other
 “ proceedings that have taken place *pendente lite*; and find
 “ that the other pursuers are in like manner barred from
 “ insisting in the conclusions of the present summons: There-
 “ fore refuse the desire of the reclaiming petition, and adhere
 “ to the Lord Ordinary’s interlocutor reclaimed against; and
 “ of new sustain the defences, repel the reasons of reduction,
 “ assoilzie the defenders from the whole conclusions of the libel,
 “ and decern; and find the pursuers liable to the defenders in
 “ expenses.”*

Dickson and others appealed.

Appellants.—1. *Annihilation of Entail of 1776.*—The action of reduction of the entail of 1809 was neither calculated nor intended to try the question as to the validity of the entail of 1776. The sole question was, whether the entail of 1809 had not been obtained by fraud; and although this allegation of fraud was negatived by the Court, and so the deed of 1809 held

* 7 Shaw and Dunlop, 503.

unobjectionable in that respect, the judgment could not have the effect to substitute the entail of 1809 for that of 1776. But supposing the judgment could be so construed, it cannot apply to lands not included in the entail of 1809. Those remained subject to the limitations created by the deed of 1776. But those in question were conveyed away prior to the execution of the deed of 1809, and consequently could not and were not embraced within it. Oct. 1, 1831.

2. *Title to pursue.*—Independent of the preceding plea, it is said that the appellant David Dickson, by taking infeftment on the conveyance in 1815 in virtue of the entail 1809, has incurred a forfeiture under the deed of 1776 libelled — has homologated the entail of 1809; and that the claim of the other appellants being made to depend on and to flow from the sustaining of his title, they have no valid title to pursue.

But first, this plea is too late, because the judgment of the Lord Ordinary, being on the merits, necessarily assumed the validity of the title to pursue; and as the respondents acquiesced in that judgment, they cannot now object to the title. Second, the entail 1776 refers only to those heirs who have succeeded to the lands by virtue of it, whereas the appellant David Dickson has not done so, and indeed one of the pleas of the respondents is, that the entail of 1776 is altogether annihilated. Neither can it be maintained that he has succeeded præceptione. If, again, reference be made to the sasine of 1815, then the answer is, that it is ex facie null, has been renounced, and has been reduced. Besides, the respondents have no title to make the objection; and even if they had, the only effect should be to dismiss the action, but not to assoilzie from the reasons of reduction. In the case of M'Culloch the deed creating the irritancy was libelled on, and therefore the defender was entitled to plead on it, but here it is not so. Neither are there any relevant facts alleged to bar the title by homologation. This necessarily proceeds on the supposition that the appellant was not originally bound, but that by his acts and deeds he has bound himself. This is rested mainly on the sasine of 1815, and the subsequent acts as a freeholder. But that sasine is a nullity, and is renounced; and the voting as a freeholder can never be held to import an homologation of a sale which had no necessary connexion with the exercise of such a right. At all events, the

Oct. 1, 1831. remoter substitutes who are claiming rights peculiar to themselves ought not to have decree of absolvitor pronounced against them in respect of acts done, not by them, but by David Dickson.

3. *Onerosity of the Entail.*—The majority of the consulted Judges were of opinion that the entail 1776 was onerous, and therefore they ought, according to the rule established in the Sheuchan case, to have given judgment in favour of the appellants. Proceeding, however, on the assumption that the decision in that case was not law, the Court below refused to give effect to the rule laid down by this House—a proceeding of the most dangerous tendency in all cases, and one resting on an erroneous conception of the principles which regulated the judgment in that case. The admission that the deed was onerous leads to the necessary result, that thereby a *jus crediti* was constituted in favour of those having right under the deed, and the sasine taken thereon converted that right into one of a real nature, which could not be defeated except by their express consent. In the present case the facts clearly establish the onerosity. Mutual claims had arisen between David and William Dickson, and formed the subjects of actions in Court. A decree of a Court would unquestionably have constituted in favour of the successful party an onerous right, enforceable by the diligence of the law. But in place of litigating in Court, the parties referred the subject matter of the disputes to the decision of arbiters, who issued a decree arbitral, in obedience to which the entail of 1776 was executed, recorded, and infestment taken. It has been said, that neither the trustees nor the substitute heirs were parties to the submission; but that circumstance cannot affect the question of onerosity. Rights may be acquired not only directly but indirectly, and on this latter principle all the class of cases under the head *jus quæsitum tertii* is founded. In the Sheuchan case heirs not in existence were found entitled to avail themselves of the plea of the onerosity of a contract to which they could not possibly be parties.

4. *Res judicata.*—This plea is peculiar to Mr. Cuninghame, and rests on the assumption that whether the entail be onerous or not, his right is complete. But the proceedings were altogether incompetent and irregular. In the first action the

Oct. 1, 1891.

judgments were not only in absence of the minor children, but they were not properly cited, and those who took it upon them to appear for their behoof had a manifest adverse interest. Besides, the sale was neither in term of the entail nor of the conclusions of the summons. Both of these referred to a sale by public auction; but in place of that the sale was made privately, and at a time when the process was asleep. The minor children thereby suffered lesion, the lands having been sold for debts not warranted, others having been undervalued, no credit given for rents arising during the process, no price paid for superiorities which constituted a valuable estate, warrant granted to sell to a greater extent than was necessary to pay the debts, lands sold accordingly, and the surplus not applied to the benefit of the heirs of entail. The second sale was equally objectionable, was altogether collusive, and Mr. Cuninghame was a party to the collusion.

Respondents. — 1. *Annihilation of Entail 1776.*—It is impossible that two entails containing inconsistent destinations and provisions can subsist at one and the same time in relation to the same estate. But the entail of 1809 is in various respects directly at variance with that of 1776. By the judgment of the Court of Session in 1814, affirmed by this House in 1820, the validity of the entail of 1809 was sustained, and therefore that of 1776 was necessarily annihilated.

2. *Title to pursue.*—The appellants found their title to pursue the present action on the entail 1776; and as it is competent for a party whose rights are attacked to inquire into the validity of the title in virtue of which his assailant attacks him, so the respondents, although not heirs substitute, are entitled to show that the appellants have no right under the deed 1776. If they were seeking to set aside the appellant's title, the plea of *jus tertii* might be available, but such a plea cannot be stated against a defender to the effect of preventing him from investigating and objecting to the title of his opponent. Now it is admitted that the leading appellant, David Dickson, made up titles to the fee of the estate under the entail of 1809, and it cannot be disputed that the effect of doing so was to forfeit all right he had under the deed of 1776; indeed so sensible is he of this, that he has attempted, *pendente lite*, to remove the objection by

Oct. 1, 1831. renouncing and setting aside his rights under the entail 1809. But this cannot avail him, for the objection to the title must be judged of as it existed at the time when made. Having therefore incurred a forfeiture of his rights under the entail 1776, neither his title nor that of the other appellants (whose rights are made to be dependent on his) can be sustained.

Farther, the appellant, David Dickson, is barred by homologation from objecting to any of the sales. They were made under the 'entail 1776, and he was in the full knowledge that the deed of 1809 had been sustained as valid, notwithstanding the previous entail. In this knowledge he took the fee of the remaining parts of the estate under the deed 1809, and in virtue of it engaged the rights and privileges of *fiar* and of superior of the lands in question.

3. *Onerosity of Entail*.—The entail 1776 was not onerous. A family dispute had taken place between David and General William. The lands were vested in the trustees of John, and their right was unchallengeable. David and the General then referred the question as to the arrangement of their family disputes to mutual friends; and they, under the form, but merely the form, of a decree arbitral, adjusted these disputes. Neither the trustees nor the heirs substitutes were parties, and consequently could not be bound by any thing done by the referees. Although, therefore, the referees took upon them to suggest (for they could give no effectual decree) that the deed of 1776 should be executed, yet this did not make it any more onerous than if it had been spontaneously executed by the maker.

Even if it were onerous, it could not prevent the estate from being sold or adjudged for the debts of the General. It is true that a decision to this effect was pronounced in the *Sheuchan* case; but it is a solitary decision, and is at variance with the established law of Scotland.

4. *Res judicata*.—The respondent, Mr. Cuninghame, made two purchases; the first was under a provision in the entail 1776 itself, and it was in every respect regularly carried through. The appellants have, by confounding actions of ranking and sale (which are regulated by statute) with an action brought in virtue of a provision in the entail, raised up various objections in point of form. These, however, are quite irrelevant, and are unfounded both in fact and law. The minor heirs were called;

their fathers, as administrators in law for them, made appearance, and except by imputing to them a possibility of acting fraudulently, it cannot be alleged that they had any adverse interest.

Oct. 1, 1831,

In regard to the second sale, the question as to its validity was tried in the declarator, and the relative suspension presented by Mr. Cuninghame. The Court found that he had no just defence against payment, and in consequence he was compelled to pay the price. This is plainly a complete *res judicata*.

The respondent, Lord Medwyn, is also entitled to the benefit of the same plea, because as the decision was pronounced in an action with the parties from whom he derived right, and as they would be entitled to found it as *res judicata*, so he must likewise be entitled to do so.

Lord Chancellor.—My Lords, this case of Dickson v. Cuninghame is one of the greatest importance and anxiety which I have ever been called upon to advise your Lordships upon since I have had the honour of holding my present situation. It is not that I have formed an opinion upon the subject with any great hesitation, or that I have found my way towards that opinion beset with any considerable difficulties; but it is because the opinion I have formed, so far as it goes to sanction the judgment of the Court below, may at first sight, without due explanation, and without proper consideration of the particular grounds whereupon it stands, appear to shake in some degree one of the most important decisions that ever was pronounced in this Court of appellate jurisdiction in any case of Scotch law. The case to which I allude is commonly known by the name of the Sheuchan case, a case decided with the greatest deliberation; and I must say, I should indeed have taken a very long time before I could make up my mind to do any thing that could throw discredit upon that important decision. I should indeed have found the path by which I arrived at any such conclusion beset by almost insuperable difficulties, and I should have been very far indeed from stating to your Lordships that I felt entire confidence in the conclusion I had reached. It therefore becomes necessary at present, and it is indeed the only task which now devolves upon me, to satisfy your Lordships, as I have satisfied myself, that the Court below might well decide this case as they have done, and that I may well advise your Lordships to affirm their decision without in the slightest degree affecting the law as determined in the case of Sheuchan. It will be unnecessary for me, I

Oct. 1, 1831. apprehend, to preface the opinion I am about to deliver to your Lordships by any minute statement of the facts and circumstances of this case, because agreeing with the judgment below, I shall not argue the case at large, but shall confine myself to indicating wherein the two cases differ, in order that the affirmance of this decision may not for a moment be supposed to shake that. I perhaps shall not be happy enough to agree in all respects with the arguments of the learned Judges in the Court below; but at all events I come to the same conclusion with them, and by that conclusion the result of my judgment leaves the Sheuchan case rather supported than disaffirmed.

The question here is, as in the Sheuchan case, generally speaking, how far the person in possession and the owner of an estate in Scotland can so deal with it as to tie up himself, and to defeat the claims of subsequent creditors, by any deed in the nature of an entail? It is to the different forms in which that general question may be put, and the different circumstances in which it may arise, alone, that I am now to call your Lordships' attention; because the other objections with respect to the title to pursue, the *res judicata*, and so on, I do not touch upon. This being the important ground, and this being the ground on which I cannot altogether agree with some of the Judges in the Court below, it becomes necessary for me, in protection of the decision of this House, to state my opinion at somewhat greater length than I am used to do when moving to affirm. My Lords, if I were to judge from what I see in print, I should certainly have been disposed to say, that the learned Judges in the Court of Session still adhered to the opinion which they maintained when the Sheuchan case came before this House. I should say, when I find so many of the learned Judges of the Second Division using the expressions which are reported, that they yielded a reluctant assent to that judgment. When I look to these observations upon the great and important question in the case, namely, whether the deed is onerous or gratuitous, when I find those learned Judges all with one voice saying that it is clearly onerous, and when I find that, notwithstanding it being an onerous deed, they hold that it is incompetent to exclude the diligence of subsequent creditors, it seems to me a little difficult to take both of those propositions—both of those results together, and to allow them both to stand, and the judgment, which was the fruit of both, to stand, while the Sheuchan case remains unimpeached; because, that is as much as to say, that, be the entail ever so onerous, be it ever so little a gratuitous disposition, an onerous deed duly recorded, according to the provision of the Act of 1685, has no power to tie up, against contracting debts *de futuro*, the institute or person to whom the fee is conveyed by the force of the provisions of the deed; and that, my Lords, is a proposition

Oct. 1, 1831.

which I cannot go so far as to maintain, if I hold, as I am determined to hold till an act of parliament forbids me, to the Sheuchan case. Now, my Lords, that the Judges of the Court in Scotland have in considering this question hankered after the establishment of the doctrine they had laid down previous to the Sheuchan case being decided, I cannot entertain a doubt, for the reason I have now given; but this opinion of mine is very strongly confirmed by the treatment which I find was given by those very learned persons in the Court below to the decision pronounced by your Lordships, at least to a remit by your Lordships, in that very Sheuchan case, after a very plain indication of the opinion of this House had been flung out by a noble and learned Lord, a member of this House. It certainly did so happen, that, when that went to the Court below, the Judges remained pretty nearly of the same opinion which they had held before, which I do not blame, nor do I commend; but I state it as a fact. My Lord Justice-Clerk says, “It is quite clear that, on attending to the terms of the entail, or rather of the contract of marriage, and deed of entail therein contained, between Mr. Vans and Mr. Agnew in 1757, that deed cannot be countenanced for one moment, so as to deprive the creditors of their right of proceeding against the estate of Barnbarroch. On looking at the terms of the deed, though it is a mutual entail, and though there is, in regard to Mr. Vans, the introduction of the word sale in that part of the deed, it is clear there is no foundation for the argument that the estate had been purchased by Mr. Agnew, or that it is to be held as an acquisition by him; for even, with regard to the word ‘sell,’ Mr. Vans ‘sells,’ &c. to himself and the heirs called to the succession. I can pay no attention to such an argument in reference to the creditors. By no contrivance whatever, even if it were deliberately intended to contrive a mutual contract for that purpose, could this gentleman’s estate be withdrawn from the claims of his lawful creditors. This is a proposition requiring no argument, as it is supported by the whole law of Scotland. Looking at the state of his affairs, there were large debts owing by him at the time. Though the operation of recording the deed of entail was immediately carried through, yet, down to 1775, there was no alteration in the titles of Mr. Vans, but he just continued as the fiar of the estate. Then came the proceedings in this Court in 1784, and the question was, whether the entail could be set aside? The Court found that it could not be set aside; but that is qualified with the finding, that the estate continued affectable by all the debts due by him, and of course with the interest. The only question that remained was the amount of the debts. These debts were made out in a satisfactory manner, and at last an act of parliament was

Oct. 1, 1831. “ obtained, which comes more properly to be considered in the other
“ case. But as to the main question here—as to the powers of this
“ party to withdraw his estate from his creditors by the deed of entail—
“ I have no doubt.” Then he proceeds to argue to that effect. Then,
in concluding, his Lordship says, “ I am for pronouncing a judgment
“ now in ipsissimis terminis of the former judgment, especially when
“ we recollect how the case was conducted; it was at least as
“ well argued and determined as it can be now by the greatest
“ abilities that ever sat on this bench.” Then we have my Lord
Robertson’s opinion—a very learned opinion—the opinion of a
great lawyer, the opinion of a most able judge, and of whom I shall
have occasion to speak more in a subsequent part of my observa-
tions. Upon the whole he repels the defences, but it is upon the
ground that the irritant and resolute clauses are not sufficient to tie
up the parties’ hands. That is perfectly a different ground from the
one on which the rest of the Court decided; it is a perfectly different
ground from that which the ultimate decision of this House negatived,
and it may stand with the decision of this House; for the proposition,
the contrary of which was pronounced by this House, was, that by no
irritant and resolute clauses, however artificially framed—however
strictly, according to the act of entail in Scotland, and the practice of
conveyancers there—that by no such means could a person take to
himself the fee by an onerous deed, so as to exclude a subsequent
creditor. If the irritant and resolute clauses were not sufficient, *quod*
voluit non fecit, the deficiency was not in the power, but in the act;
he had the power to defeat his subsequent creditors, but the means
he had taken to defeat his creditors failed him. Lord Glenlee comes
back to the Lord Justice-Clerk’s view of the case:—“ For my own
“ share, it is inconceivable to me how any one can doubt the pro-
“ priety of the judgment formerly advanced;” and then he says,
“ No such thing was necessary for enabling him to tie up himself.
“ There is a great extravagance in this idea. If that was the only
“ argument omitted formerly, I am not surprised that it was omitted,
“ for I dare say such an argument never occurred to mortal man
“ before.” Now, I have the greatest respect for this very learned
Judge, but that is not consistent with the fact. The argument may
be right or may be wrong if it did occur; but I can show your Lord-
ships that there are very great lawyers to whom it did occur, and
among them one of the greatest writers in Scotland, whose opinions
I have read, and whose doctrine is precisely that which Lord Glenlee
says never occurred to mortal man before. We then have the
opinion of Lord Craigie:—“ I am entirely of the same opinion. I
“ think, not only that the irritancy was not properly against Mr. Vans,
“ but that he had always the fee of this estate,” which, it must be ob-

served, does not much touch the question. “ It is far different from
 “ the case of an institute, who takes it qualified from the proprietor.
 “ Mr. Vans had the right of property, and it was never taken from
 “ him.” But that is just the question, namely, whether it was taken
 from him by conveyance to himself and his wife for a valuable consideration ?

Oct. 1, 1831.

When, therefore, I find so great a disposition on the part of the learned Judges to cling by the first decision in 1784 against the intimation contained in the judgment of the Court of Appeal on the first branch of this case, that fortifies me in the opinion I have expressed, that the judgment of the Court below in this case was all but intended as an impeachment of the authority of the judgment of this House in the Sheuchan case. I have tried all I can to avoid arriving at this conclusion. I have strained every point, so far as I could, consistently with a due regard to the truth of the case, and I have done so on account of my great respect for the Court below, to see whether I could discover that the learned Judges pronounced this decision, having a due regard to the authority of the Sheuchan case ; but although, in express words, they do not set it aside, I cannot discover that it was possible for them to rest the present judgment upon the grounds whereupon they have rested it, and to have felt all along that they were not impeaching the decision of that case ; and sure I am, my Lords, that if I simply, according to the former practice, moved an affirmance, without any reference to the Sheuchan case, that case would probably next year in the Court below be deprived of the authority to which it is clearly entitled from the great learning, and the extraordinary sagacity brought to bear upon it, as it was on almost every case, for many years during the time that Lord Eldon and Lord Redesdale assisted your Lordships in this House. My Lords, this brings me to say one word more respecting the Sheuchan case upon its own merits. I find it stated in the able argument in the respondent's case — “ The respondent is sensible of the difficulty
 “ which he has to contend with in maintaining this last plea in consequence of the judgment of this most honourable House in the
 “ well-known case of Sheuchan ; and while he regards with the most
 “ unfeigned respect a judgment pronounced in the highest court of
 “ judicature, he at the same time with the utmost deference trusts,
 “ that if it can be shown to be at variance with those principles
 “ of law which had been long considered settled in Scotland, your
 “ Lordships will not regret that an opportunity has occurred for its
 “ reconsideration ;” the effect of which is this, that though the deed is onerous (and they cannot maintain that it is gratuitous), yet admitting that it is onerous, they have a right to a judgment here, affirming the judgment below. Now, I perfectly agree with the

Oct. 1, 1831.

learned counsel when he says that; and I feel no doubt that he is sensible of the difficulty he has to contend with in maintaining this last plea in consequence of the former judgment of this House, and he does not evade the point; nay, he reminds us of what Erskine says, that a judgment of this House is not an act of parliament—that your Lordships, in deciding appeals, act in the character of judges, and not of lawgivers; that the House of Lords, in the same manner as a court of law, deals but with the particular case in hand, and that it cannot introduce any rules binding upon itself in another case. My Lords, I take that proposition to be admissible only with a qualification. The decision of this House is not of such binding force, any more than that of the Court below, as to preclude the House, in a case of precisely the same kind between different parties, taking a different view of the law, or of the inference, in point of fact, to which particular circumstances may lead. I suppose a case to arise between A. and B., and that case to be decided, and then a case to arise between C. and D. of precisely the same nature; there is no doubt that the result of the consideration of the facts in the second case, the conclusion of fact might be different, and that, on the question of fact, the Court might come to another result. Take a case as to the rights between two persons, A. and B., standing in the relation of principal and agent, and that then a case arises between C. and D.: that the selfsame facts are presented, or only varying in some very minute particulars; there is no doubt that the Court which had decided, as between A. and B., that agency was not established, might, as between C. and D., come to a different conclusion, affirming the agency which they had denied before upon the same facts; and, secondly, they might come to a different result, in point of law, with respect to the obligations attaching upon agency. That is perfectly true, no doubt; but nevertheless it is not correct to lay down as a general rule that a decision of this House on a matter presented to it in its appellate character is not binding upon it. The House is not bound by it as by a law, but it is its endeavour, as it is its duty, to decide consistently with former decisions, as it is the endeavour and the duty of every court to adhere to the same principles which it has before laid down—to favour rather than to exclude that which has been established, and always to preserve an uniformity of decision. If an error has been committed—if a slip has been made—if a plain oversight has happened—if in any way a mistake, either in conclusion of fact or inference of law, has been made, God forbid that this Court, any more than any other, should not be open to the reconsideration of the case, and, if manifest error has been committed, to the setting it right. But it is equally true that until it shall be shown to be clearer than day-light that error has been committed in a decision

Oct. 1, 1831.

which has been made, especially where time has elapsed, under the impression that a certain rule of law prevailed, and where a certain legal principle has been sanctioned by the decision of a court of competent authority, and parties have acted upon the faith of that being right, and property has been invested, and rights have been dealt with, on the presumption of that being law, it is clear that it would be wrong to undo all which had been done during the interval, for the purpose of reverting to a technical nicety and accuracy of decision. It might be a great deal more mischievous to regain the position which had been lost than to proceed on the rule laid down, though erroneously; and upon this principle it was distinctly said by Lord Mansfield, in a well-known case in the Court of King's Bench, that if conveyancers had for a great many years understood that which was drawn into question to be the law, it would be better that it should remain, even although somewhat in error, if it was considered to be a settled rule of law, and not be shaken for the purpose of making it better than it had been. So much, my Lords, with respect to the authority of the decision, barely as a decision; but I have said, if there should appear to be a manifest error, the setting that right could not be attended with any great evil. Under such circumstances it is fit the case should be reconsidered, and the former decision, which had been of binding force, rectified; but, my Lords, having well known the *Sheuchan* case formerly—having assisted in arguing cases which were affected by it—having assisted in advising on cases in which the authority of that case came in question, and having since given it more consideration—having thoroughly investigated the particulars of it, and the grounds of decision in which the Court here differed from the Court below—I am clearly of opinion that it is not more to be respected out of a consideration for the very learned persons who advised your Lordships at the time than it is to be respected for the reasons in the judgment—the irrefragable reasons of Scotch law, distinctly Scotch law—the purely technical reasons, as well as the general reasons and principles on which my learned predecessors rested it. My Lords, I have read most carefully the judgment pronounced by my Lord Eldon in that case, in which, after a most anxious discussion of the facts, he refers to the venerable authority of the great Scotch lawyers who had assisted in framing the *Agnew and Vans* settlement, the mutual entails by them settled, and the opinions of those learned persons, which happily are preserved. Now, my Lords, the opinion of a counsel, even if he afterwards ascends the bench, I admit not to be a competent mode of obtaining the law of the country. It perhaps may be a little less objectionable, when we are dealing with the law of a foreign country, to have recourse to such matters; but Lord Eldon, having fortified himself with those opinions,

Oct. 1, 1831. did not rest only upon them. I should have felt, perhaps, some reluctance to open the door to that mode of ascertaining the law, but after it has been opened by Lord Eldon I cannot avoid taking advantage of the information that has come in through it; and I find the decided opinions of Sir Ilay Campbell, possibly Lord Braxfield, though that does not appear quite so clear,—certainly Mr. Maclaurin, afterwards Lord Dreghorn, and Mr. Crosbie, one of the most able and learned Scotch lawyers, a man of the highest authority in those matters; and not only one opinion of Mr. Maclaurin and Mr. Crosbie, but a second opinion, upon reconsideration; and, first of all, they do show that Lord Eldon did not introduce a great innovation into the Scotch law in differing from the judges who decided in 1784, and afterwards in 1824 adhered to that opinion. Thus I certainly must at once deny the proposition, that he differed from all the Scotch lawyers, and proceeded without any Scotch authority. There has been no judgment on real property ever pronounced by this House which appears to me less open to the imputation of having been either a rash and ill-advised judgment, or a judgment on Scotch law, proceeding on English principles. Such an imputation I remember to have heard cast on the decision of this House in the Queensberry case, which I, on behalf of my client, when at the bar, resisted, but which decision, notwithstanding that imputation, has been maintained, and is now the prevailing opinion of good Scotch lawyers. But the present case is liable to no such imputation. It might there be said, that considering the total difference of principles upon which a Scotch and an English estate were held by an institute under a Scotch entail and a tenant for life under an English settlement,—considering that those fundamental principles of the Scotch and English law are not only different, but almost wholly opposed,—our English lawyers had in the Queensberry case introduced somewhat of the English principle; but the judgment in the Sheuchan case stands as entirely free from any possibility of such suspicions as if there were no such country as England, and no such system of jurisprudence as the English,—as entirely as if the judge who recommended its adoption had been still in Scotland and had never crossed the Tweed. Sir Ilay Campbell, a great authority in that law, afterwards President for so many years of the Court of Session, seems to entertain no doubt whatever on that transaction. He first says he apprehends it “to be clear that it was an onerous transaction, which neither
 “ party could afterwards defeat, except by mutual consent. By the
 “ clauses of limitation recited in the memorial I apprehend that the
 “ memorialist’s father, that is John, was tied up from contracting
 “ debts to affect either the estate of Sheuchan, or his own original
 “ estate of Barnbarroch, as the clauses expressly relate to him, as

Oct. 1, 1831.

“ well as to the heirs after, and are prohibitive, irritant, and resolu-
 “ tive;” differing certainly from Lord Robertson, who, upon that
 ground, appears to have joined with the other Judges in the decision.
 “ Such debts, therefore, as he has contracted posterior to the exe-
 “ cuting and recording of the settlement will not affect the estate,
 “ though, as to prior debts, if there be any, I think they will affect
 “ the lands of Barnbarroch; but I presume all these were paid off
 “ by the 3,000*l.* which was then advanced to him by his father-in-
 “ law.” Messrs. Maclaurin and Crosbie go into the matter at some-
 what greater length, and they go a little further. Your Lordships
 perceive that Sir Ilay Campbell’s opinion rests upon the onerousness
 of the entail; he only says that the entail, being onerous, cannot be
 defeated, except by mutual consent. I shall presently remind your
 Lordships in what respect those circumstances do not at all coincide
 with the present case; but he was^d of opinion, that such being the
 nature of the transaction, the party could validly tie himself up. But
 Messrs. Maclaurin and Crosbie say, “ Whether the entail was onerous
 “ or gratuitous does not appear to us to be material, for there was
 “ nothing to hinder Vans to convert the fee-simple that was in him
 “ into a tailzied fee, and that was done by the entail in question.”
 In their subsequent opinion they certainly do not go quite so far as
 that; they rather rely upon the onerousness, and they also make
 many remarks upon the great inconvenience and the great injustice
 that must result from so large a proposition as their first opinion
 might seem to sanction. Now, my Lords, as it is fit I should fairly
 state to your Lordships the opinion I hold upon the present occasion,
 the greater or less degree of importance of which I must leave to your
 Lordships’ consideration, I can see no warrant in the Scotch law
 authorities, either the text-writers to whom Lord Eldon refers or the
 decisions—(I am talking now of course of cases prior to the Sheuchan
 case, for I am dealing with the grounds of the decision in that case)
 —I see no warrant from any of those cases—no authority, nor any
 principle arising out of the matter itself, to authorize such a propo-
 sition as this, that the owner of a Scotch estate, possessing it in fee-
 simple, can do any act of this kind, whereby he can, without con-
 sideration, gratuitously, voluntarily, and without any party being in
 existence who is otherwise than as a volunteer with respect to him,
 tie it up so as for the future to hold in himself the apparent owner-
 ship of that estate, while he excludes from any recourse against that
 estate the creditors with whom he, subsequently to that act, and as if
 dealing with the property, shall contract debts. I can see no warrant
 in the Scotch law to entitle me to hold with those learned persons,
 that if the deed was done gratuitously, which is the proposition they
 at first laid down, without any onerous consideration at all, and all

Oct. 1, 1831.

parties claiming under him being volunteers, he can thus defeat subsequent creditors. It is perfectly true (I admit to those learned persons whose opinion I am taking the liberty, with great humility, to sift,) that there are in the Scotch law two records provided by the act of 1685, the one of which was introduced by the act, and the other existed before; and by registering the title, and availing himself of the old record and the new record provided by that act, he could validly divest himself of the property altogether; so it may be said he may divest himself in a qualified mode, and continue to hold that power which he reserves to himself, though not by way of life-rent. I do not conceive that it signifies whether it is by life-rent or in fee; but if he may hold it in fee, and yet be tied up from contracting debt, so that those with whom he contracts debts shall have no recourse against that estate, it may be said, caveat emptor; it was the lender's own fault that he did not go to the register; he might have seen in the register of tailzies that this property was tied up, that this man was not safe to lend money to, and that the estate was not his to borrow upon. But, my Lords, there is in the system of all countries, there is in our law, this,—that though a gratuitous sale may be binding as against volunteers, yet it cannot stand for a moment against onerous creditors. And so of a bond being personal. Nevertheless a man had as just a right to bind his personal assets as his estate; that is the only difference in the two cases. It may be said, that the deed being registered, it is their own fault; but no court of justice can sanction such a principle; for though the register exists into which, past all doubt, a man may look, and though it is stated in the second opinion of Maclaurin (and it is a singular fact) that bankers are in use to have in their possession, and to hang up for a constant and easy reference, lists of all tailzied estates, in order to see under what prohibitions and restrictions persons hold their property, and to take care not to lend their money where they may incur risk, yet what are poor tradesmen to do who see a man in the possession of property; they cannot be expected to go to the Register Office every time they receive an order to furnish any article for the household; every little dealing of that kind cannot be suspended till they send to Edinburgh to the Record Office to see whether it is safe or not; and yet people always look to the landed estate, as ultimately to come in with the personal estate for their security. It is pretty well known whether a man is heir of entail or not; but a man would be able, if the law was such as Maclaurin and Crosbie conceive, to commit very great frauds. It is quite sufficient for me to say there is no authority for that; it is quite sufficient for me to say this is not now meant to be laid down as law; and as regards the Sheuchan case, that not only it gives no authority whatever to this proposition, but the greatest

Oct. 1, 1831.

pains are taken throughout the decision to rest it upon the circumstances of the case. I do not mean to say that it is a case going on specialties; it goes on the broad ground of the transaction in question being most onerous. It is not necessary to go into Lord Eldon's observations upon the subject, in which again and again he most explicitly says, "that whoever it be that drew the deed, there was no doubt it must be taken to be onerous;" then he states in the most anxious manner, guarding his decision repeatedly, "I have a very strong conviction that, independently of that statute of 1685, such a deed as this, (recollect, my Lords, I do not say a gratuitous deed, but such a deed as this,) proceeding on an onerous consideration and valuable consideration, not a mere mutual entail, but proceeding like-wise on money considerations, is competent to bind him;" and so he goes on throughout. But, my Lords, instead of referring to that, I will refer to the very distinct, and I think very satisfactory, statement of the case by Lord Robertson in one of the most able and lawyer-like judgments I have seen in any of the courts. He sums it up thus: "In these circumstances, I consider that the entail is strictly onerous; first, because it is a mutual entail, and each entail entered into in consideration of the other." Now the mutuality of the entail would not make it onerous; but I agree with Lord Eldon in the passage I cited, when he says, that this is different from a mere mutual entail—not made onerous, nor depending upon the mutuality of the entail, but on other grounds. Lord Robertson puts that first: "secondly, because from the preamble which I have read, and other provisions, it is of the nature of a contract of marriage;" and so says my Lord Justice-Clerk in distinct terms, that it is in the nature of a contract of marriage; and so certainly it was, the parties being John Vans and his father-in-law, Miss Agnew's father, with whom he, John Vans, had contracted a clandestine marriage. Though the marriage had been contracted, it is nevertheless in the nature of a marriage contract by the Scotch law, which distinctly recognizes the validity of post-nuptial contracts, and it is not the less entitled to be considered as coming within that description than the contract well known in our law—namely, a contract before marriage, proceeding on a consideration in the highest degree onerous, namely, the consideration of marriage,—the only difference being, that with us it is not executed, but executory. The provisions of the Scotch law distinctly recognize the high nature of the consideration of marriage, even when it is a consideration executed—when it is a post-nuptial deed, and this arising out of circumstances—cases of clandestine marriage being much more common in Scotland, and it being a highly important and exigent duty in such cases to provide for the interests both of the woman and the issue of the marriage; "and, thirdly, it is onerous, because it is granted

Oct. 1, 1831.

“ in consideration of 3,000*l.* paid by Mr. Agnew ;” that is, paid to Mr. Vans. My Lords, that is a most material part of the case. There is not only a mutual entail — not only a post-nuptial contract of marriage, which it distinctly is — but there is also a sum of 3,000*l.* — a substantial money consideration — 3,000*l.* sterling paid by the one of the entailers to the other ; the consideration not being merely that of its being a mutual entail, and in consideration of marriage, but there being, in addition, the adequate consideration of 3,000*l.* ; and I may say (as Sir Ilay Campbell appears to have suspected when he gave his opinion) 3,000*l.*, in all probability, applied to extinguish the debts affecting the property before that time ; but that did not make it less a valuable consideration, for what can be more important than for the man to get rid of the burden of debts hanging over his estate ? Lord Eldon uses a remarkable expression — he makes an observation very well worthy of attention — that, independently of the act of 1685, such a deed proceeding on an onerous consideration, and valuable consideration, would bind the party. I cannot conceive why it should not. Without the help of the act of 1685 he could not regularly, and by valid clauses, bind as against singular successors, as the Scotch law has been held to be ; but that a man can, for a valuable consideration, tie up his property, so that it shall not be affected by his creditors, appears to me a perfectly evident proposition ; it is a proposition applying not only to Scotch transactions, but to English, that a man may tie up his property, provided he does it for money ; for what is a conveyance but tying it up for money ? — what is a mortgage but tying up the estate for money ? In most parts of England there is no registration. In the counties of Middlesex and York there is a register very similar to that of Scotch estates, and in other counties there may be registers established also, by the passing of the Registry Bill, now under the consideration of the legislature. What would be the difference between tying an estate up in the way now under discussion and tying it up by mortgage, whereby you at once exclude all subsequent mortgagees, when it is registered where a register exists, or without any registration in other counties, and you make all other creditors come in as *puisne* creditors ? Now, the consideration of marriage suggests a further observation. How clearly does this appear to be a marriage contract, when you consider another peculiarity in the case, which does not apply at all to the present. There Vans, one of the entailers, entailed upon Agnew, the son-in-law, and his wife. It was not merely upon Agnew himself, and then upon a series of heirs, but upon Agnew and his wife, and the longer liver. Now I do not mean to say that the limitation of the estate to himself for life, whom failing to a series of heirs, makes any difference, because I do not think the giving

Oct. 1, 1831.

to him and his wife in conjunct fee, and to the longer liver, can be taken otherwise than as a gift to them conjunctly as fiars, and to the survivor as sole fiar. You cannot make a distinction in consequence of that. If it were possible to consider the Sheuchan case as that of a life-renter, this would be a ground on which the judgment of the Court might rest, admitting the onerousness of the transaction on the one hand, but denying on the other the power of the party to take a fee and to tie it up during his own enjoyment; but I cannot consider the Sheuchan case to be one of life-rent. It is clear that the two parties were joint fiars, with a sole fee to the survivor, and the husband took upon the decease of his wife. The Sheuchan case was considered to be distinctly decided on the ground of its being an entail for an onerous consideration, and the facts I have adverted to show that the estate is one in which, against all subsequent creditors, he takes a fee — in which a series of heirs of destination afterwards take fees in succession — tailzied fees, according to the Scotch law of entail. My Lords, I have felt it to be necessary for me to comment at some length upon the Sheuchan case before I came to the present, because otherwise the consistency of the two decisions could not be so well seen; and before leaving these more general topics I would mention a circumstance connected with them. Some doubt appears to be raised, respecting the English law upon the subject, and this matter has been once or twice broached upon the present question. It does not at all enter into my consideration. It is not inaccurate, however, to state that attempts were made at one time in England by parties to create perpetuities by covenants, whereby they endeavoured to tie up their own hands and the hands of their successors against alienation. Those were entirely put an end to by several solemn decisions of the Judges in Westminster Hall. It was attempted in various ways—first in Corbet's case, in Coke's 1st Report, 84; and there it was provided in the deed, that if any of the parties interested under it should do any act concerning alienation by which an estate tail should be barred or the succession in tail be determined, the estate of the person so doing should cease, and the estate enure to the next succeeding tenant, as if the life of the tenant forfeiting were entirely ended, which is very like an irritant and resolute clause. It does not say, if he shall alienate, but if he shall try to alienate; it makes the act void, any attempt to do it ineffectual, creating that which we should call in the Scotch law an irritant clause; and then it forfeits the right of the heir making such an attempt, which is like a Scotch resolute clause. All this was very much considered by the Courts, and it was held not to be competent but upon the ground that it was inconsistent with the nature of an estate tail; for an estate tail is first given, and shall not be defeated but by the death of the tenant in tail without issue. If you say B.

Oct. 1, 1831. shall take, as if A. was dead, that is saying nothing, for A. being dead does not defeat his estate ; it is only if he dies without issue of his body that the estate tail determines. If any gentleman wishes to study the subject further, there are various cases in which this has been decided, with respect to estates tail, as often as attempts have been made, from the time of Edward the Fourth downwards to create perpetual successions. In the famous case of Taltarum, in the Year-book in 12 Edward IV., it was held, that such a provision could not prevent a tenant in tail suffering a recovery ; and in *Sonday's* cases, in 9 Coke's Reports, the same proposition is laid down ; in *Mildmay's* case, in 6 Coke's Reports, and in many others ; but if any one wishes to see the whole of this learning, which is well worthy of the student's attention as it is of the historian's, he will find the whole collected together in the celebrated argument of Mr. Knowler in the case of *Taylor on demise of Attkyns v. Horde*, in the first volume of *Burrow's Reports*, one of the most able and learned arguments that was ever made at any bar, and which, I think, stands unrivalled in any report in the English law.

Having stepped aside to dispose of this, I shall now make a few observations upon the peculiarities of this case, and upon the grounds on which it is determined, and in respect of which it is distinguishable from the *Sheuchan* case. The learned Judges, consolidate several questions in one, in the answers to the ninth, tenth, and eleventh questions,—“Whether the entail of 1776 was an onerous deed? “Whether (supposing it onerous or even gratuitous) it was effectual “to secure the estate against the subsequent acts and deeds of the “late General Dickson? and if so, is Mr. Cuninghame's defence “against the conclusions of the action, in regard to the land comprehended in his father's purchase, well founded ; first, upon “the plea of *res judicata*, or, secondly, upon the merits of the proceedings in the action in 1784?” The learned Judges—the Lord Justice-Clerk, Lord Pitmilley, Lord Cringletie, Lord Meadowbank, and Lord Mackenzie—Lord Glenlee not particularly adverting to this—say :—“We unite all these queries, because we think they “may be answered at once ; we think that the deed of 1776 was beyond all doubt onerous. None of the judges entertained doubts of “its onerosity in 1784, when the question was agitated, whether it “was effectual or not. They only say it was ineffectual, because “General Dickson entailed the estate on himself, which, in their “opinions, ought to have been done by the trustees, and not by the “General.” My Lords, I cannot quite separate the effectual nature of the entail from the question of onerosity ; but it seems the ground of objection was taken in the Court below, that it should have been executed by the trustees and not by himself. Now, I certainly am

Oct. 1, 1831.

not at all able, from any consideration I can give to this case, to arrive at the conclusion that this was an onerous deed; and having dwelt upon the particulars of the Sheuchan case, and which shows so manifestly onerousness, I come to the arguing, whether there is, in the following circumstances, any thing that can be called parallel to the facts of that case. In 1767 John Dickson, the uncle of the General, being brother of David the General's father, executed a trust deed for, among others, the manifest purpose of excluding his brother David from the management of the estate; and after the payment of certain annuities, the trustees were to grant in favour of William Dickson, that is the General, and a certain class of heirs. In 1775 the trustees conveyed the estate in favour of the General, and a certain series of heirs described by the next deed; and that was the same series of heirs to whom, afterwards, the general deed of 1776 limited the estate. Now, in 1771, disputes having arisen in the family, at the head of which David Dickson then was, from the pre-decease of his brother John, they appear to have come to terms, and the General and David his father executed a deed of submission to arbitration. It appears that the arbitrators dealt with the subject, and made their award or decret-arbitral; and by it they commanded the General to execute the deed of entail in question, and in consequence of that decret-arbitral it is said he executed the entail. My Lords, I pass over various objections that are raised to the validity of the submission and the decret-arbitral. It appears to me that any thing done only in virtue of that award cannot be said to be an onerous transaction, but gratuitous; however, I pass that by, because there is an objection to the whole which appears to me fatal—neither any children, nor any wife, nor any trustees for the wife, nor any relation of the wife, nor any party whatever except William the son and David the father, were parties to the submission; there was no party except David who could not compel himself to execute this deed, there was no person to bring an action for the nonperformance of the award, or a suit to compel its performance. When David and William were making a family arrangement for the purpose of not doing it themselves, but having indifferent men to decide between them, and to restore peace to the family, they called in those arbiters; and on their advice William executed this deed; for I do not see what power the arbiters had to compel this; I do not see any submitting parties who could compel this except David himself; and supposing David had a right, and there were now in the field the representatives of David, I now ask, whether it can be said to be any thing further than a mere gratuitous deed. What right had they—what possible right had David against William, or against William's representatives, except what William chose to give him? William is

Oct. 1, 1831.

the subject of the first deed of John, and it is to get at William his uncle that the father orders the trustees to denude themselves; that is, to divest themselves by a conveyance to William. David is out of the question; he has no right given in the deed executed other than and except the right which William chooses to give him. But the deed of submission to execute this family arrangement, and restore domestic peace, states, as the motive, some new title on which David could insist; for that is a material consideration. If you look at the whole of these deeds of 1767 and 1775, the deed of John, by which the trustees obtained the estate, and the deed by which those trustees denuded in favour of William, they are not charged with any prohibitory, irritant, or resolute clauses; they are simple destinations by the law of Scotland. If there had been a valid entail executed by the son, or even if the trustees had validly executed an entail, though that entail might have been reduced, the matter might have been viewed in another aspect; but there is no entail created by the deed which gave the trustees their title, the deed of 1767; it is simply a destination or direction that they shall denude in favour of William and a certain series of heirs; a perfectly valid disposition to William, a perfectly sufficient exclusion of David the heir of law, a perfectly legitimate and complete title to William to take the estate when the purposes of the trust should have been fulfilled, but no title to the series of unborn heirs; for that could be created only by an introduction of clauses prohibitory, irritant, and resolute, and no such clauses affect this title; therefore the submission, my Lords, could be of no binding value. If we are to pass over the great difficulty of the trustees being no parties, if we are to pass over the great difficulty of there being no substitutes in the field, if we are to pass over the great difficulty of the decret-arbitral being on matters not submitted by any competent parties, and the complainant being sued by no competent parties, it still resolves itself into a deed of a perfectly different description from an onerous deed; namely, a voluntary submission to arbitration — a submission by a volunteer; and therefore the question comes back to this: If you say that the entail in question was not gratuitous, but onerous, what made it onerous? If it is said the decret-arbitral, what made the decret-arbitral necessary or gave it force? If you say the submission, what made the submission necessary or obligatory? Therefore, when I look into these matters, which are referred to as proving onerousness, if I find they are not onerous but gratuitous transactions in their nature, or, at all events, if not simply and absolutely gratuitous, that there is not the slightest resemblance between their nature, their force, and their incidents in law, and the operation in law of the circumstances in the Sheuchan case, I have a right to found myself upon the

authority of the decision in the Sheuchan case, and upon the reason which sanctioned that decision, namely, that if a party, vested with an estate, chooses to make for valuable considerations a settlement of it upon himself, or upon himself and his wife in fee, and to the survivor, and to any series of heirs not in a simple destination, but one fenced by the proper irritant and resolute clauses; and if he chooses to tie up himself as well as those heirs from contracting debts with creditors posterior to the deed, at all events posterior to its registration in the record of tailzies, such creditors are excluded from all power to affect the estate by their diligence any more than they could affect an estate sold away for a price. But then I must also hold, that the principle of that decision, and the ground upon which it rests, does not extend to a case like the present; that it extends to no gratuitous case; at all events, it is enough for me to say, and to show your Lordships, that this is not a case in its circumstances at all resembling the Sheuchan case. Oct. 1, 1831.

I perceive that there was an attempt made in the Sheuchan case to exclude the diligence of the prior creditors, and it is perfectly clear that that was the intention of the parties; for if you look at the date of the deed you will find that they were all excluded, just as much as the subsequent creditors; “that neither the said John Vans “ and Margaret Agnew, nor any of the other heirs and members of “ entail aforesaid” (John and Margaret were however not heirs of entail but institutes)—“who shall take or succeed to the said lands “ and estates by virtue of these presents, shall suffer or allow any “ special adjudications to pass against the said lands and estates, or “ any part thereof, for payment of the debts of the said John Vans “ contracted before the date hereof, or for payment of the real and “ legal burden payable furth of the said estates, or for payment of “ any other debt to which the lands and estates may by law be sub- “ jected in any time hereafter.” Now it is perfectly clear that this was only a personal obligation against the parties; that it could not be suffered to have the power of barring the prior debts, but that these were recoverable in spite of it; nor does the authority of the learned President, Sir Ilay Campbell, at all sanction the notion of their being barred. My Lords, I have stated, the great respect I feel for the noble and learned Lords who decided the Agnew case, and who stated the reasons on which their decision was supported; and I shall not be charged with the least insensibility to the value of that authority, or the value of those reasons, when I say, that if there is any one part of that case on which I entertain a doubt, it is on the question whether the Agnew entail and the Vans entail were properly fenced, as against the institute, by irritant and resolute clauses. There may be some doubt—possibly they were not properly fenced; and Lord Eldon’s judgment having, as very often happens, been

Oct. 1, 1831. directed much more to the main body of the opposite arguments, possibly his Lordship did not sufficiently attend to the only ground upon which, in my humble judgment, there could be any question. He has not decided that point, and in the decision in the Court below the Judges do not appear to have dealt with it. I take the decision, however, to have been right, even upon that on which alone I feel any doubt. As to the main point of law, and that called the principle of the Sheuchan case, I entertain no more doubt, as far as my opinion goes, than upon the subject of any of the most unquestionable principles of Scotch law. I therefore once more say, that though I cannot agree with the learned Judges in the *rationes decidendi* of the present case, and in the doubts which those reasons cast upon that of Sheuchan, yet I concur in the conclusion to which they have arrived; and it is a great satisfaction to me to know that Lord Eldon, who attended in the course of the argument and heard a great part of it, having come down because he understood that the Sheuchan case was to be questioned in the course of this, went from hence with the conviction that the two decisions could well stand together. That is the impression left upon my mind by the conversation I had with the noble and learned Lord. I now move your Lordships that the interlocutors be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities. — (1.) *Title.* — D. of Roxburghe, 5th March 1734 (Craigie and Stewart's Ap. Ca. p. 126); Campbell, 5th Feb. 1760 (7783); Creditors of Cromarty, 25th Feb. 1762 (15,417); Turner, 17th Nov. 1807 (No. 16, Ap. Tailzie); Kinfauns, 16th June 1554 (7796); E. of Mar, 7798; King, 7799; Cranstoun, 7801; Bellenden, 7816; Gordon, 14th Nov. 1749 (Kilk. p. 445); Irving, 2d April 1770 (H. of L. not rep.) (2.) *Merits.* — Sheuchan case, 31st July 1822 (1 Shaw's Ap. Ca. p. 320, and authorities there); Hope's Min. Pr. p. 143, 146, 147; 2 Mackenzie on Tailzies, 489; Robertson's Ap. Ca. 207; Kerr, 9th June 1795 (Bell's Ca. No. 1956); V. of Garnock, 28th Nov. 1795 (Craigie and Stewart's Ap. Ca. p. 167); Gordon, 29th July 1791 (15,513.) (3.) *Res Judicata.* — 2 Bell, 273 (5 ed.); 2 Ersk. 12, 63; M. of Titchfield, 22d May 1798 (No. 4. Ap. Tailzie); 1 Ersk. 6, 34; 1, 7, 13; Grant, 15th Nov. 1682 (12,175); Bannatyne, 14th Dec. 1814 (F. C.); Agnew, 30th July 1822 (1 Shaw's Ap. Ca. p. 333); 4 Ersk. 3, 3; Kames' El. p. 173.

Defenders' Authorities. — (1.) *Title.* — Gordon, 14th Nov. 1749 (Kilk. p. 445); Gilmour, 6th March 1801 (No. 9. App. Tailzie); Mackenzie, 17th May 1826. (ante, Vol. IV. No. 377, and 3 Wilson and Shaw's Ap. Ca. p. 352); 3 Ersk. 3, 47, 49. (2.) *Merits.* — 1 Ersk. 1, 47; Sandford, p. 124. (3.) *Res judicata.* — 4 Stair, 40, 16; 4 Ersk. 3, 3; 1 Ersk. 6, 54; 1 Ersk. 7, 13.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,
—Solicitors.

JAMES KER and HENRY JOHNSTON (for the Leith Bank), Appellant.—*Lord Advocate (Jeffrey)—John Miller—Anderson.* No. 52.

JOHN BELL, &c., Respondents.—*Dr. Lushington—Sandford.*

Cautioner—Circumstances in which held, (affirming the judgment of the Court of Session,) that the cautioners of a bank agent were released from their obligation by the conduct of the bank, in permitting him to carry on an illegal trade, to violate his instructions, to incur unusual hazard and loss, to become deeply involved, and to commit important irregularities, without the cautioners being apprized.

THE Leith Banking Company, in Spring 1822, appointed Scot to be their agent at Langholm in Dumfries-shire, on which occasion he granted a bond of caution to the bank, in which George Scott Elliot, William Curll, John Bell, and the late Walter Jardine bound themselves, along with him, for 5,000*l.*, for his faithful management of the agency. At the same time, the bank directors framed a paper of instructions for Scot's guidance, containing, among others, the following clauses:—(1.) That Scot should commence in a moderate way, and in bills for small sums, not having more than three months to run;—there should always be two undoubted separate securities on each bill. (2.) That such cash accounts as it might be thought proper for the bank to grant, as well as any deposit current accounts which might be opened, should be kept in their books at Leith; and that these accounts should be regularly entered in Scot's books, and the drafts checked before being paid. (3.) The transactions for the week to be stated in a clear and distinct manner, and a state thereof to be regularly sent to the bank once a week; the balance to be detailed at length, specifying the amount of notes, bills current and past due, each bill stated at length; and if past due, the reason why it is not paid; and the latter, should there be any, to be regularly sued for payment, but not in the bank's name: and (4.) As the business proceeds, several other things may occur from time to time, as to render it necessary for the bank to alter the aforesaid instructions, in whole or in part, as they may see proper; and the bank therefore reserve to themselves the power of doing so, should they deem such alterations upon, or additions to the instructions requisite; and should they

Oct. 1, 1831.

1st DIVISION.
Ld. Corehouse.

Oct. 1, 1831. find that their instructions are departed from, the agency will undoubtedly be withdrawn altogether. This paper of instructions was subscribed by the bank managers and by the cautioners.

In April 1824, James Bryden, Curll, Jardine, and Bell, granted a supplementary bond of caution for 5,000*l.* in nearly the same terms as the former, and signed the instructions. At this time the balance against Scot was above 5,000*l.* according to the allegation of the cautioners, and above 4,600*l.* as admitted by the bank, but the latter alleged that the whole of this arrear was afterwards recovered, except about 400*l.*

In the course of the same month, as the bank were desirous to establish an agency under Scot at Carlisle, and were afraid that, as they consisted of more than six partners, their doing so for the purpose of circulating their notes payable on demand would be an infringement of the statutory privileges of the Bank of England, they took the opinions of English counsel (Sir N. C. Tindal and Mr. Abercromby) on the subject. Both counsel concurred in opinion that such an establishment would be illegal. After some pause on the part of the bank, they resolved to run the risk of attempting such an agency; and accordingly, in the end of 1824, or the earlier part of 1825, an office was opened by Scot at Carlisle, where he subsequently issued the company's notes, and transacted their business to a much larger extent than at Langholm. In the mean time, with their sanction, he took out a license as a private banker there, and eventually incurred the chief part of his ultimate arrears. He was afterwards allowed a salary of 1,250*l.* by the bank; and his former commission was withdrawn, to deprive him, as they alleged, of all temptation to incur unnecessary risks. They did not intimate to the cautioners the opening of the branch at Carlisle, nor the change in the mode of paying Scot.

At the time when there was no agency office except at Langholm, Scot had been in the practice of attending English fairs, where, with the knowledge of the bank, he pushed business to a considerable extent. After the opening of the Carlisle office, this traffic was much increased; and it was admitted by the bank that at one fair (Broughill, in Oct. 1825,) an extra remittance had been made to him of 40,625*l.*, and that his transactions and issues of notes at some of these fairs were from 30,000*l.* to 40,000*l.* In carrying on his extensive business through the

Carlisle office, and also, though to a subordinate extent, through the Langholm office, Scot persevered, as before, in renewing bills, without attending to the rule required by the instructions, and in allowing past due bills to lie over unprosecuted. Most, if not all, of these irregularities were sometimes combined in his mode of dealing with single firms or individuals. He also allowed large over-drafts of accounts, and transacted much business with individuals, (said to be cattle-dealers, and others of no visible property,) whose first connexion with him arose by an order or note for money, while they had no cash or deposit account in the bank. In all this he persisted until the termination of his agency, notwithstanding the frequently repeated censures and prohibitions of the bank, and he did so by means of the large amount of notes with which they continued to furnish him. Oct. 1, 1831.

In the month of June 1825, Bell, Jardine, Bryden, and Curll granted a new bond of caution for 10,000*l.*, which proceeded on the narrative of the bond for 5,000*l.* having been granted in 1822 for the agency business at Langholm; and that, “in consequence of the extension of the agency business,” a new bond for 5,000*l.* was granted in 1824; that Mr. Scott Elliot wished to withdraw his name from the first bond, (the only one signed by him,) and the Leith Bank had agreed to cancel the two former bonds; therefore the other four above-mentioned cautioners granted bond, conjunctly and severally, for 10,000*l.* The caution was to cover the past as well as the future transactions of Scot, from the commencement to the conclusion of his agency. It was specially declared that Scot should have “full power and liberty to transact and carry on the business of the said agency in Langholm, Carlisle, or in any other towns or places,” &c. The bond contained a similar clause to that already quoted from the first bond, relative to the right of the cautioners to inspect the agency books, accounts, &c. It did not appear that the cautioners were again required to subscribe the paper of instructions, which all of them had read before; but the following clause was appended to the bond, and signed by the cautioners: “From the extension of the business of Mr. Archibald Scot’s agency for the Leith Banking Company, the directors and managers thereof have found it expedient to alter from time to time the instructions given to Mr. Scot at the commencement of the said agency business, (as therein reserved,) of all

Oct. 1, 1831.

“ which we hereby approve ; and also that the said directors and
“ managers shall reserve to themselves the same power and right
“ of altering the same, in whole or in part, at any time they may
“ see proper, and that without any notice or intimation being
“ previously or subsequently made to us thereof.”

This bond was signed at intervals in the month of June 1825. On the 11th of that month, the balance against Scot was 56,530*l.*; but the bank averred it to have been reduced, before the bond received its last signature, to 36,612*l.* By the cautioners it was alleged, that, of this sum, 19,000*l.* consisted of arrears ; and the bank admitted that 9,972*l.* arose on over-drafts of two accounts alone, as exhibited to them by Scot. They averred, however, that almost the whole arrear of past due bills or over-drafts then existing was eventually recovered, or at least recoverable. The cautioners did not insist on an inspection of the agency accounts, and no notice was given to them of the existence of this arrear, or of Scot's deviations from the paper of instructions, nor was any hint of distrust or dissatisfaction expressed by the bank. The bank stated that no distrust was felt ; and that as the balance against Scot subsequently varied from 20,000*l.* up to 90,000*l.*, this was a proof of the unlimited confidence which they themselves then reposed in him.

On the 4th of August 1825, the bank caused Mr. Scot to find additional caution to the extent of 5,000*l.*, under a bond in which Robert Elliot of Cooms was sole cautioner ; and it was alleged by the cautioners, that the correspondence with Elliot for this bond was begun at the date of taking the one for 10,000*l.* Elliot's bond stipulated that the bank should have no claim against him until they had first discussed the present cautioners. No intimation of this bond was made to them.

In July 1826, the bank sent one of their tellers to inspect and superintend the Carlisle agency ; and in consequence of his report, (which intimated, inter alia, a suspicion that Scot kept double books,) the manager of the bank and their law agent went to Carlisle in August, and summarily took possession of the whole books and accounts ; but Scot was allowed to continue ostensibly agent for the bank.

In September, the bank arranged with Scot that he might open a cash-credit with them to the extent of 4,000*l.*, if he found proper security. Seven gentlemen then signed a bond, each for

500*l.*, several of these being cautioners under the former bond. Oct. 1, 1831.
This cash-credit was operated on to the extent of 3,246*l.* 11*s.* 1*d.*
The bank admitted that the purpose of this credit was to enable Scot, *inter alia*, to pay up an arrear of cash due to themselves, amounting to 1,363*l.*

No notice was given to the cautioners at the time of the bank's taking possession of the books; but a letter, dated about the time of granting the cash-credit bond, was sent to them by the bank manager from Carlisle, stating, that "I am presently here inspecting the state of the agency, and, at Mr. Scot's desire, arranging and securing payment of outstanding accounts; and further, I beg leave to intimate that I am quite ready to give you every necessary information on the state of the agency which you may require in terms of the bond of caution." None of the cautioners, however, asked for this information.

Jardine, one of the four co-cautioners, died; and his trustees, being desirous to get his children relieved of the obligation, caused a communication to be made to the bank to that effect. The law agent of the bank wrote, on the 1st of December 1826, that Scot was doing all he could to procure security to the bank, in order to relieve Jardine's heirs; and added, "Under such circumstances, and for very obvious reasons, I would suggest the prudence of not communicating the result of my states, until it was known whether Mr. Scot had succeeded in procuring new security." It was stated generally that the bank were quite ready to communicate the state of the agency; "only, should any thing arise from the communication, so as to retard or prevent Mr. Scot from obtaining new security, the trustees will blame themselves."

In the course of the same month, the bank having notified their intention to remove Scot, he resigned; and, on the 28th, the bank addressed a letter to the cautioners, intimating this event. As two of the co-cautioners were by this time bankrupt, a subsequent demand was made against John Bell and the heirs of Walter Jardine for the sum of 10,000*l.* under their bond of caution,—a balance of 35,145*l.* 2*s.* 1*d.* being finally stated as due by Scot. The bank, by a state more hastily made up, had calculated this balance at 53,382*l.* 18*s.*

A charge was then given to Bell, and an action was brought against the heirs of Jardine. Bell suspended; and the trustees

Oct. 1, 1881. lodged defences, both parties denying their liability. In support of this they stated, that the claim of the bank arose out of illegal banking transactions carried on by Scot, under the instructions and in the employment of the bank, in direct and known violation of the public statutes; in respect the Leith bank established, under the management of Scot, a banking branch at Carlisle, but without obeying the statutory provisions, without which such agency was illegal. The bank gave Scot extraordinary power; allowed him to transact business contrary to the usual rules of banking, in direct opposition to his very instructions; were dissatisfied with his conduct, yet preserved an inviolable secrecy on these and other points, lulling the cautioners into absolute security, and concealing the state of affairs into which the banking matters had been brought by Scot's irregularity and culpability. Without any communication with the original cautioners, the bank increased their risk and responsibility, by taking a further bond of caution for the 10,000*l.*; and, quite regardless of the consequences to the cautioners, the bank gave Scot an extraordinary credit, far beyond what was or could be contemplated by the cautioners; allowed an enormous balance or arrear gradually to accumulate upon his account; and the increase of credit and arrears were more particularly caused by the extension of the business, and that illegally, into England. The bank also unduly and purposely concealed material facts from the cautioners in regard to the conduct and accounts of Scot, both at the time when the additional bond was granted in April 1824, and when the renewed bond was granted in June 1825. Further, upon the decease of Jardine, the bank obtained information of the extent to which their agent had involved or was involving them, and proceeded to take the most prompt and active measures, keeping, however, all these matters secret from the cautioners, and by positive deceit blinding them, and preventing them adopting steps which, if timeously used, might still have afforded them some protection. Among various acts of folly and rashness, the bank neglected the due negotiation of the bills, and failed to do timeous or exact diligence for recovery of the different debts composing the claim sued for.

The Bank, on the other hand, maintained, that the cautioners had bound themselves for all loss and damage that might be sustained by the bank through any of Scot's transactions, as

Oct. 1, 1891.

their agent, and also for the faithful and honest discharge of the duties entrusted to him, and were liable for the loss occasioned by him to the extent of the bond. The cautioners were not liberated from their obligation in consequence of the transactions entered into by Scot in England; and, at all events, the Bank of England statutes being passed solely for the protection of the Bank of England, it was *jus tertii* in the cautioners to found upon them. They were quite aware that Scot was carrying on business in England, and having bound themselves to guarantee any loss which might arise from his transactions, they were bound to relieve the bank from that loss, notwithstanding the alleged illegality. At all events, the alleged illegality of some of the transactions could not prevent the bank from claiming upon others, to which no such illegality attaches. The cautioners were bound by their bond to look to the transactions of Scot themselves, and were not entitled to devolve exclusively upon the bank the responsibility of guarding against the improper practices of the agent; and nothing short of fraud, or of such gross negligence as is in legal construction equivalent to fraud, on the part of the bank, could relieve the cautioners from their obligation.

The Court (12th May 1830), in the suspension, suspended the letters simpliciter, and decerned, and, in the ordinary action, sustained the defences, assoilzied the defenders from the conclusions of the action, and decerned with expenses.*

The Bank appealed.

Appellant. The cautioners being bound, conjunctly and severally, with Mr. Scot, not only for all loss and damage of

* 8 Shaw & Dunlop, p. 721. About this time the Lord Chancellor, in a suit at the instance of Hobson's assignees v. Scot (29th July 1830), pronounced this order: "I do order that so much of the debt of the said Archibald Scot (if any), the consideration of which consisted of notes of the Leith Banking Company, delivered at Carlisle by the said Archibald Scot as agent of that bank, be expunged from the proceedings had and taken under the said commission; and I order that it be referred to the said commissioners to inquire and state what were the circumstances attending the remainder of the said debt so proved by the said Archibald Scot, and how such debt was constituted, with liberty for the said commissioners to state any special circumstances, as to the whole debt of the said Archibald Scot, or any part thereof, at the request of either party."

Oct. 1, 1831.

every description that might be sustained by the bank through any of his transactions as their agent at Langholm, Carlisle, or elsewhere, but for all loss that might arise from his failing carefully and diligently to attend to the business of the agency, and faithfully and honestly to discharge the duties intrusted to him, are liable, in terms of the obligation contained in the bond, for the loss which has been sustained during his management of the agency to the extent of 10,000*l*.

The cautioners are not liberated from their obligation in consequence of any alleged illegality in the transactions entered into by Mr. Scot in England. The business, as carried on by him there, is not declared illegal by the Bank of England statutes. At all events, these statutes were passed solely for the protection of the Bank of England, and it is *jus tertii* to the cautioners to found upon them. They cannot plead that the exclusive privileges of the Bank of England have been infringed, because they have no interest to maintain that plea.

Further, the cautioners, being fully aware that Scot was carrying on business in England, and having bound themselves to guarantee any loss which might arise from his transactions there, are bound to relieve the bank from that loss, notwithstanding any alleged illegality.

At all events, the loss sustained from transactions entered into in Scotland exceeds 10,000*l*., and the alleged illegality of some of the transactions cannot prevent the bank from claiming upon others to which no such illegality attaches.

The cautioners, being sureties for Mr. Scot's faithfulness and honesty in the management of the agency, were not entitled to devolve on the bank the whole duty and responsibility of guarding against any improper practices committed by him. They were bound to look to the affairs of the agency themselves. Nothing short of fraud, or of such gross negligence as is in legal construction equivalent to fraud, on the part of the bank, can relieve the cautioners from their obligation.

No such circumstances can be established in the present case with reference to the granting of the bond, the management of the agency, or the conduct of the bank, subsequent to August 1826, as amount to fraud, either actual or legal, on the part of the bank, or as are relevant to release the cautioners from their obligation.

Oct. 1, 1831.

The cautioners are barred *personali exceptione* from objecting to any irregularity in Mr. Scot's mode of conducting the business of the agency, of which they themselves were in the full knowledge, and which they sanctioned by their own transactions with him.

The Court of Session, before pronouncing any final judgment on the merits of the cause, ought to have remitted it to an accountant, in the first place, to fix and ascertain the particular debts contained in the stated account, of which the consideration consisted of notes of the Leith Banking Company, delivered at Carlisle by Scot as their agent; and, in the second place, to separate the transactions entered into by Scot in his character of agent, from those which were carried on by him on his own private account, without the knowledge of the bank.

The judgment of the Court of Session proceeded chiefly on the ground, that the sureties were discharged by the laches and gross negligence of the appellants, while the material facts on which the alleged laches and negligence are founded were not only not established by evidence, but the bank explicitly and pointedly denied them on the record, and were ready to produce evidence to disprove them.

Respondents.—The respondents were released from all claim under the bond of June, 1825, in respect of the gross deceit and concealment of material facts then practised upon them by the bank, and by the material alteration which was effected on the contract, and the great increase of risk which was imposed upon them as prior cautioners by the taking of, and still more by the peculiar terms of Elliot's bond.

The deceit practised by the bank, and the gross negligence committed by them subsequent to the date of the last bond, and whereby the whole loss was created which has latterly arisen upon Scot's accounts, had the same effect.

They were also released from all liability in respect of the farther deceit or undue concealment practised towards them subsequent to the death of Mr. Jardine, or, at least, subsequent to the alleged discoveries of the bank in August 1826, and whereby the respondents were necessarily prevented from taking timely steps against Mr. Scot, for their own relief or security.

And the appellants cannot maintain action for any part of the

Oct. 1, 1831.

every description that might be sustained by the bank through any of his transactions as their agent at Langholm, Carlisle, or elsewhere, but for all loss that might arise from his failing carefully and diligently to attend to the business of the agency, and faithfully and honestly to discharge the duties intrusted to him, are liable, in terms of the obligation contained in the bond, for the loss which has been sustained during his management of the agency to the extent of 10,000*l*.

The cautioners are not liberated from their obligation in consequence of any alleged illegality in the transactions entered into by Mr. Scot in England. The business, as carried on by him there, is not declared illegal by the Bank of England statutes. At all events, these statutes were passed solely for the protection of the Bank of England, and it is *jus tertii* to the cautioners to found upon them. They cannot plead that the exclusive privileges of the Bank of England have been infringed, because they have no interest to maintain that plea.

Further, the cautioners, being fully aware that Scot was carrying on business in England, and having bound themselves to guarantee any loss which might arise from his transactions there, are bound to relieve the bank from that loss, notwithstanding any alleged illegality.

At all events, the loss sustained from transactions entered into in Scotland exceeds 10,000*l*., and the alleged illegality of some of the transactions cannot prevent the bank from claiming upon others to which no such illegality attaches.

The cautioners, being sureties for Mr. Scot's faithfulness and honesty in the management of the agency, were not entitled to devolve on the bank the whole duty and responsibility of guarding against any improper practices committed by him. They were bound to look to the affairs of the agency themselves. Nothing short of fraud, or of such gross negligence as is in legal construction equivalent to fraud, on the part of the bank, can relieve the cautioners from their obligation.

No such circumstances can be established in the present case with reference to the granting of the bond, the management of the agency, or the conduct of the bank, subsequent to August 1826, as amount to fraud, either actual or legal, on the part of the bank, or as are relevant to release the cautioners from their obligation.

Oct. 1, 1831.

The cautioners are barred *personali exceptione* from objecting to any irregularity in Mr. Scot's mode of conducting the business of the agency, of which they themselves were in the full knowledge, and which they sanctioned by their own transactions with him.

The Court of Session, before pronouncing any final judgment on the merits of the cause, ought to have remitted it to an accountant, in the first place, to fix and ascertain the particular debts contained in the stated account, of which the consideration consisted of notes of the Leith Banking Company, delivered at Carlisle by Scot as their agent; and, in the second place, to separate the transactions entered into by Scot in his character of agent, from those which were carried on by him on his own private account, without the knowledge of the bank.

The judgment of the Court of Session proceeded chiefly on the ground, that the sureties were discharged by the laches and gross negligence of the appellants, while the material facts on which the alleged laches and negligence are founded were not only not established by evidence, but the bank explicitly and pointedly denied them on the record, and were ready to produce evidence to disprove them.

Respondents.—The respondents were released from all claim under the bond of June, 1825, in respect of the gross deceit and concealment of material facts then practised upon them by the bank, and by the material alteration which was effected on the contract, and the great increase of risk which was imposed upon them as prior cautioners by the taking of, and still more by the peculiar terms of Elliot's bond.

The deceit practised by the bank, and the gross negligence committed by them subsequent to the date of the last bond, and whereby the whole loss was created which has latterly arisen upon Scot's accounts, had the same effect.

They were also released from all liability in respect of the farther deceit or undue concealment practised towards them subsequent to the death of Mr. Jardine, or, at least, subsequent to the alleged discoveries of the bank in August 1826, and whereby the respondents were necessarily prevented from taking timely steps against Mr. Scot, for their own relief or security.

And the appellants cannot maintain action for any part of the

Oct. 1, 1831. present claim, in respect that it arises out of transactions prohibited or declared illegal by public statutes.

To this the allegation of acquiescence or homologation affords no relevant answer.

Lord Chancellor.—My Lords, upon a full consideration of the case upon the grounds on which it was dealt with and decided in the Court below, I feel it to be my duty humbly to advise your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

MONCRIEFF, WEBSTER, and THOMSON—M'CRAE,—Solicitors.

No. 53. JOHN DICK, Appellant.—*Lord Advocate (Jeffrey)*—*Burge*.

DONALD CUTHBERTSON, Respondent.—*Serjeant Spankie*—*Rutherford*.

Sale—Expenses.—Held (affirming the judgment of the Court of Session), 1. That the purchaser of a property at public sale, who had successfully suspended a charge for payment on the ground of a defect in the title offered, and had frequently insisted for fulfilment, but who had never proposed to abandon the bargain, was not entitled, on a good title being offered after a lapse of eleven years, to refuse it on the pretext of being free altogether. 2. Held competent to award the prior expenses to a party, who was successful in a former appeal.

Oct. 1, 1831.
—
2^d DIVISION.
Lds. Cringletie
and
Fullerton.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (Dec. 12, 1826) ordered and adjudged, “ That so much of the said interlocutor of 11th March 1818, as
“ finds that the respondent is not bound, at the expense of the
“ bankrupt’s estate, to make any addition to the title offered by
“ him, but that he is bound, at the risk and expense of the
“ representer (appellant), to concur in any supplementary title
“ he may wish to have executed, be, and the same is hereby
“ reversed; and it is declared that the respondent is bound to
“ make to the representer a good and valid title, and that the

* 2 Wilson & Shaw, 522.

“ title offered to the representer is not such good and valid title ; Oct. 1, 1831.
 “ and with this reversal and declaration, It is ordered that the
 “ cause be remitted back to the Court of Session in Scotland, to
 “ review the several interlocutors complained of in the said
 “ appeal, and to do therein as is consistent with this reversal and
 “ declaration, and the practice of the Court in proceedings of
 “ the nature of that in which these interlocutors have been pro-
 “ nounced.”

The Court of Session proceeded to apply the judgment, and Janet Gillies, the wife of James Corbet the bankrupt, (May 8, 1828,) with consent of her husband, and the said James Corbet, for his own right and interest, executed at Lancaster, in Upper Canada, a disposition of the villa and acres adjoining in question in favour of Cuthbertson as trustee on the sequestrated estate. This disposition Cuthbertson tendered, removing the only objection which Dick had ever raised against implementing the purchase, namely, that the disposition by the wife had not been granted with consent of her husband. Dick denied that this was a good title, and that, even if good, he was no longer after so many years delay bound to accept of any title or complete the purchase. He also objected to the validity of the title on the ground of an alleged objection to the election of Cuthbertson the successor of Donald, formerly trustee, but who had died during the appeal.

The Lord Ordinary Cringletie (12th May 1829) “ appointed
 “ parties to attend by their counsel to close the record ;” and added the subjoined note.*

* “ The Lord Ordinary has advised this cause ; he will hear the parties after the
 “ record shall be closed ; but at present he confesses that the objections to the title of
 “ the trustee appear to him to be very ill-founded, because the suspender (objector)
 “ concurred and joined issue with the respondent, quà trustee, in the House of Lords.
 “ With him the question was there tried ; and the judgment was there obtained which
 “ has brought back the cause to this Court. Here again, in this Court, the objector
 “ put in his petition to have the judgment of the House of Lords applied. It has
 “ been applied ; and after all this, that the objector should turn round and object to
 “ the title of the trustee quà such, does seem to the Lord Ordinary not only to be
 “ ill-founded, but very ill-judged. If there was no proper respondent in the appeal,
 “ the judgment of the House of Lords must be null ; and the consequence of that
 “ would be, that the decree of this Court, which was pronounced between competent
 “ parties, must still be in force ; but that cannot be assumed in the circumstances of
 “ the case. The objector has homologated the appointment of the trustee ; the House
 “ of Lords have recognised him in this case ; and the whole proceedings in that

Oct. 1, 1831.

And thereafter (19th Dec. 1829) the Lord Ordinary Fullerton, before whom the case had come, “ in respect that the
 “ title now offered by the charger (Cuthbertson) appears to be
 “ a good and valid title to the property purchased by the sus-
 “ pender (Dick), found the letters orderly proceeded, and
 “ decerns: Finds the suspender entitled to the expenses of the
 “ litigation prior to the appeal: In regard to the litigation sub-
 “ sequent to the appeal, finds the charger entitled to expenses
 “ from the date of the Lord Ordinary’s interlocutor of 14th
 “ January 1829.”*

“ right honourable Tribunal, and in this Court since the cause returned to it, have
 “ been on the basis of the acknowledgment of the validity of his title. All the ob-
 “ jections founded on the contrary assumption, therefore, appear to be extremely ill-
 “ founded. As to the objection that the suspender is entitled now to repudiate the
 “ bargain, that appears to be incompetent in this action, which does not involve the
 “ validity of the articles of sale, and contract made thereon by the suspender, but
 “ only the interpretation of its terms. Whether there may be room for a claim of
 “ damages competently made and proved, is a different question. And with regard
 “ to the objection to the title as now made up, the Lord Ordinary is not aware of any
 “ sound objection to it. Donations by wives to husbands (admitting this to be a
 “ donation by a wife to her husband) are not revocable when the deeds said to consti-
 “ tute the donation are made to a third party for onerous causes. On all these, and
 “ the other points of the cause, particularly the question of the expenses of process
 “ prior to the appeal, the Lord Ordinary will hear parties after the record shall be
 “ closed.”

* “ The title now offered to the suspender seems to be good. The ratification and
 “ disposition by Corbet and his wife effectually secure the suspender against all chal-
 “ lenge at the instance of the wife, or any person succeeding to her right; and in
 “ regard to the danger of challenge from another quarter, that of the creditors, in
 “ consequence of the supposed informality of the present charger’s appointment as
 “ trustee, it is to be observed, first, that his appointment took place under the autho-
 “ rity of an interlocutor of the Court, specially founding on an order of the House of
 “ Lords, which interlocutor could not well admit of a challenge on the part of the
 “ creditors; and, secondly, (which appears to be conclusive,) that, even on the suppo-
 “ sition of such challenge of the charger’s appointment being competent, the creditors,
 “ and any new trustee they might appoint, could never dispute, but would necessarily
 “ be bound to warrant and maintain the sale made to the suspender by Donald, the
 “ original trustee, whose appointment was confessedly unobjectionable. Holding the
 “ title now offered to be good, and considering the nature and grounds of the present
 “ suspension, the demand of the suspender to be set free from the bargain, in conse-
 “ quence of the delay in producing that title, does not appear to be admissible. Such
 “ a plea may perhaps form a good ground of suspension, as it may form a good defence
 “ against an ordinary action for implement; but the present suspension is one of an
 “ essentially different character. It proceeds, not on the assumed extinction of the
 “ original bargain, in consequence of the seller’s failure to implement, but merely on
 “ the incompetency of enforcing its obligations against the suspender, whilst that con-
 “ tracted towards him, of affording a good title, is not implemented on the other side.

In consequence of the Lord Ordinary having in his note Oct. 1, 1831. alluded to "a separate action founded on the special circumstances of the case," Dick, to obviate any difficulty in point of form, raised an action concluding that he ought and should be found and declared to be freed and relieved of all obligations incumbent on him under the said articles of roup and sale, and of all action or diligence competent to the expositor, or others in his right, under the said articles of roup and sale, against the pursuer for implement thereof, with all that has followed, or may be competent to follow thereon ;" and also concluding for reduction of the appointment of Cuthbertson as trustee upon the estate of James Corbett. This action having been conjoined with the suspension, the Court found (Nov. 30, 1830), "That the suspender is not entitled to be freed and relieved of the obligations incumbent on him under the articles of sale of the property in question, and that the charger's title thereto being now complete, a good and valid title has been offered to the suspender : Adhere to the interlocutor reclaimed against in the suspension, and refuse the desire of both notes : And in the declarator and reduction, sustain the defences, and assoilzie the defender from the conclusion summons, and decern : Of new, find the suspender and pursuer liable in the expenses incurred by the charger and defender subsequent to the inter-

"The original bill of suspension recites and proceeds upon a protest made by the suspender, which sets forth, 'That the said John Dick had repeatedly offered to pay the price, and was still ready to do so, on a legal title being produced ;' and the very first reason of suspension is, 'That the charger, before he can call for payment of the price, must produce a legal and valid title to the property which he has taken it upon him to sell.' A suspension of this kind seems necessarily to imply the competency of supporting the charge, by producing a good title in the course of the process ; and the judgment of the House of Lords is perfectly consistent with this view. For although this question seems to have been raised in the appellant's case, the House of Lords, after reversing the findings in the interlocutors of the Court, proceeds to declare, 'That the respondent is bound to make to the representer a good and valid title, and that the title offered to the representer is not such good and valid title.' Whatever grounds, then, there may be for the suspender's plea of mora, and whatever effect it may be entitled to in a separate action founded on the special circumstances of the case, it does not appear to the Lord Ordinary to be admissible in the present process. The suspender's claim for the expenses prior to the appeal seems necessarily to follow from the nature of the discussion, in which he was ultimately successful ; but the Lord Ordinary has found him liable in the expenses created by his unfounded objections to the title offered to him since the case was remitted by the House of Lords."—6 Shaw & Dunlop, p. 396.

Oct. 1, 1831.

“locutor of 14th January 1829, and remit to the Lord Ordinary
 “to modify and decern for the same, along with the expenses
 “found due to the suspender by the interlocutor reclaimed
 “against; reserving to the suspender all legal action and claim
 “competent to him for damages which may be alleged to arise
 “from the delay in the charger’s completing his title, and to the
 “charger his defences thereto.”*

Dick appealed against as much of this interlocutor as found that he was not entitled to be freed and relieved of the obligations incumbent on him under the articles of sale of the property in question, and that the respondent’s title thereto being now complete, a good and valid title had been offered, and also against so much of it as adhered to the interlocutor reclaimed against in the suspension, and refused the desire of the appellant’s reclaiming note, and in the action of declarator and reduction sustained the defences, and assoilzied the defender from the conclusions of the summons, and of new found the appellant liable in the expense found due by the interlocutor of 19th December 1829.

Cuthbertson cross-appealed against the interlocutor in so far as it found him liable in expenses prior to the former appeal.

Appellant (Dick).—1. It was a condition of the contract of sale in 1817, that a good and valid title should be granted to the appellant at Whitsunday 1817. This condition the respondent and his predecessors failed to implement, during a period of more than nine years thereafter. The appellant is thereby entitled to be declared free and relieved of the obligations incumbent on him under the contract of sale.

2. The appellant is entitled to be declared free and relieved of the obligations incumbent on him under the contract of sale in question, because the title even now offered to him is not a good and valid title.

Respondent.—1. The judgment of the House of Lords, of 12th December 1826, plainly implies that the respondent was bound to give, and the appellant to accept, of a good and valid title to the property purchased by the latter. No undue

delay took place, after this judgment was pronounced, in offering to the appellant such good and valid title. Oct. 1, 1881.

2. The appellant has neither title nor interest to challenge the respondent's appointment and confirmation as trustee on the sequestrated estate of Corbet, the proceedings in regard to which were sanctioned by the order of the House of Lords, and are in every respect legal and correct. Besides, the validity of the title offered to the appellant does not depend upon the efficacy of the respondent's title as trustee, the disposition and ratification being granted in favour of Mr. Cuthbertson nominatim, whereby he is enabled to give a good and valid title to the appellant, even though objections could be stated to his nomination as trustee.

Appellant (Cuthbertson in the cross appeal). The interlocutor of the Court below finding it competent to award the expenses prior to the appeal, and actually awarding these expenses to Dick, are alterations of the judgment of this House, not warranted either by the judgment itself, or by any principle of law or justice. But independent of this plea there are no equitable grounds in the circumstances of this case, on which the appellant can claim any of the expenses incurred by him, and in justice the whole expenses of this litigation ought to be awarded against him.

Respondent.—It was decided by the Court of Session, after a very mature consideration of the authorities, that it was competent for that Court to award the expenses incurred in the litigation in the Court of Session prior to the appeal to this House. Being competent, it was equitable and just to find the appellant Mr. Dick entitled to the expenses incurred by him in the litigation prior to the appeal, seeing that by the judgment of this House, pronounced in the appeal, it was found that he had been altogether right in that part of the litigation, and had thus been improperly and illegally put to these expenses by the respondent and his predecessor.

LORD CHANCELLOR.—My Lords, in this case my opinion was in favour of the judgment in the Court below on the original appeal, but there was a doubt remaining in my mind, whether the Court of Session had the power which they had assumed, of dealing with the question of costs upon its being sent back for their consideration. Upon looking

Oct. 1, 1831. into that part of the case, however, I entertain no further doubt. The opinion to which I then inclined is now confirmed; and I would move your Lordships that the judgment of the Court below, both in the original and the the cross appeal, be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—(*Sale.*)—Little, 14th Feb. 1749 (Mor. 14,177); Brown on Sale, p. 234; Sugden on Law of Vendors, 5th edit. p. 206, 334; Pothier, Traité de Vente, No. 75; 1 Ersk., 6, 29, 35; Scott v. Lady Cranstoun, 10th Aug. 1776 (No. 1, App. Husband and Wife). (*Expenses.*)—Falljeff, House of Lords, 12th March 1794, not reported; Maberly, 11th March 1826 (4 S. & D. No. 362); Spiers, 30th May 1827 (5 S. & D. No. 344).

Respondent's Authorities.—(*Expenses.*)—Campbell and Company, 21st May 1803 (No. 3. App. Exp.); Flesher of Canongate, 7th July 1809 (F. C.); Falconer, 4th March 1815 (F. C.); Wilson, 12th Nov. 1814 (F. C.); Bowie, 5th Dec. 1816 (F. C.); Pringle, 6th March 1799 (No. 1, App. Exp.); Geddes, 16th Feb. 1816 (F. C.); Wilson, 18th June 1818 (F. C.); Reid, 18th Nov. 1825 (4 S. & D. No. 166); Agnew's Executrix, 24th June 1826 (4 S. & D. No. 456); Earl of Fife, 8th July 1826 (4 S. & D. No. 497); Wallace (*Shaw's App. Ca.* 42).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,
—Solicitors.

No. 54. J. B. KER and others, Appellants.—*Lord Advocate (Jeffrey)—Tinney.*

SIR R. W. VAUGHAN, &c. (LADY ESSEX KER'S TRUSTEES),
Respondents.—*Dr. Lushington—Murray.*

Deathbed—Title to pursue.—A 'party mortis causa conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under her hand; and in default of making such writing, to pay the residue to her next of kin; and thereafter executed a writing of directions on deathbed, which was challenged by the heir at law.—Held (affirming the judgment of the Court of Session), that if the heir could set aside such writing, he would thereby occasion that default, in the event of which the liege poustie deed had disposed in favour of the next of kin; and therefore he was barred by want of interest from insisting in a reduction of the deed.

Oct. 1, 1831.
1ST DIVISION.
Lord Newton.

ON the 1st of March 1819, Lady Essex Ker, who was possessed of landed estates in Scotland, executed a trust-disposition and deed of settlement, in favour of the late Earl of Winchelsea

Oct. 1, 1881.

and Sir Robert Williams Vaughan, of her whole estates, heritable and moveable, of which she should die possessed. The purposes of the trust, she declared, were “to sell and dispose of the
“said lands and real estates, and out of the proceeds thereof,
“and of my personal property to be collected and recovered by
“my said trustees, to defray the whole charges and expenses attending the execution of the trust, and to pay all the just and
“lawful debts I may owe to any person or persons at the time of
“my decease, in any way, or by any kind of security, and then
“to pay over the residue and remainder of the said proceeds to
“and for the use of any person or persons I shall name by any
“writing under my hand, or for such purposes as I may direct
“by such writing, and in default of my making such writing, or
“giving directions in writing, then to pay over my said residue
“to my next of kin, according to the law of England, or
“Statute of Distributions.” She named the trustees her executors, and gave them “full power to prove these presents, with
“any separate writing, if any be, in the nature of a codicil or
“direction, so far as regards my personal estate, in the proper
“Ecclesiastical Court in England, and to obtain confirmation
“according to the forms of the law of Scotland.” She reserved power to revoke or alter.

She died on the 11th of September of the same year; and there was found in her repositories a writing in the form of a codicil or testament, bearing date the 9th of August, and having her mark subscribed to it, on the 7th of September, before three witnesses. It was not holograph of her, and it was admitted that, at the date of her subscription, she was on deathbed. By this deed she directed all her Scottish estates to be sold after her death, and bequeathed various special legacies, and, among others, to persons then her next of kin. She desired the residue of all her property to be divided into four equal parts,—one to be given to a Mrs. Garrety,—another distributed among charities,—the third to be retained by the Earl of Winchelsea,—and the fourth by Sir Robert Vaughan, &c., the two latter of whom she named her executors, and concluded with an “earnest request to them
“that they will be pleased to see this my last will and testament
“carried into effect, as well as the deed of trust accompanying,
“executed by me March 1819, to which I have nominated them
“my trustees.” There was no express revocation of the trust-

Oct. 1, 1891.

deed, which it was admitted had been executed in liege poustie. The above writing was proved and sustained as a testament by the English Ecclesiastical Court; and claims were made under it in the Court of Chancery by the legatees, including the next of kin.

John Bellenden Ker and John Bulteel, Esqrs., heirs-portioners of Lady Essex Ker, after unsuccessfully attempting to set aside the above writing on various grounds, and particularly that it was ineffectual to exclude them from the Scottish estates,* brought a reduction on the head of deathbed. The conclusions were, that it should be found null and void, “so far as the “same directs the proceeds of the said Lady Essex Ker’s real “estate in Scotland to be made over to the special and residuary “legatees therein named, to the prejudice of the pursuers, her “heirs at law;” and being so reduced, that it should be declared “that the pursuers, as heirs-portioners foresaid, have the only “good and undoubted right to the residue of the said estates “conveyed by the said Lady Essex Ker to her said trustees by “the said general disposition, after payment of the debts due by “her, and that the said defenders have no right or claim what- “ever to the said real estate in Scotland, or the proceeds thereof, “under the said will or writing.”

The trustees admitted that the writing or testament had been executed on deathbed; but they maintained—

1. That the right of the heirs at law to state any such objection was excluded by the trust-conveyance executed in liege poustie; and,

2. That the law of Scotland in regard to deathbed could not affect the deed in question.

The Lord Ordinary having reported the case, the Court ordered cases, and thereafter submitted to the other Judges for their opinion this question:—“It being admitted that the deed “under reduction was executed on deathbed; Whether the pur- “suers are barred from insisting in the action, on the grounds “set forth under the first, second, and third heads of the “defences?” On advising these opinions the Court sustained the defences, and assoilzied the defenders. †

* 7 Shaw & Dunlop, p. 454.

† 8 Shaw and Dunlop, p. 694.

Ker and others appealed, and the arguments of the parties were the same as those in the Court below. Oct. 1, 1831.

On parties having been heard the Lord Chancellor desired that the case might stand over, that he might look into and reconsider the authorities quoted. On the case being resumed—

LORD CHANCELLOR.—My Lords, in this case, I stated when it was heard, that I should look into it, and reconsider the authorities to which I had been referred, and should then mention what occurred to me. With reference to the case itself, I must say, (which I do without the least intending to impeach the very great learning and ability with which it was argued,) that I have seen questions of much more difficulty, and involving property to a much greater amount, disposed of in far less time and with infinitely less of printed paper than have been consumed upon this. It is truly nothing more than the construction and effect of these few words,—“and then to pay
“over the residue and remainder of the said proceeds to and for the
“use of any person or persons I shall name by any writing under my
“hand, or for such persons as I may direct by such writing; and in
“default of my making such writing, or giving directions in writing,
“then to pay over the said residue, to and among my next of kindred,
“according to the law of England.” The question turns simply upon the meaning of the word “such;” and upon regard being had to those lines I have now read, referring back from “such writing” to what was the immediate antecedent—“to pay over the residue and
“remainder of the said proceeds, to and for the use of any person
“or persons I shall name, by any writing under my hand, or for such
“purposes as I may direct by such writing.” Now it is contended on the part of the appellants, that any direction, however inept, however fruitless, however void of all influence whatever, however remote from a writing by which any interest may be pretended or assumed to be given, is a sufficient performance of this condition, to prevent the operation of the words “and in default;” for that there would be no default if there was any writing at all, even if it was not an appointment, or a direction, which is no less than saying that it would have done, even if there had been a song written. My Lords, I am clearly of opinion, in the *first* place, that the interlocutor appealed from ought to be affirmed; in the *next* place, that the argument in print, and in writing, and at the Bar, ought only to be commended for its extraordinary learning and its extraordinary diligence; for this case ought to have been argued in a very small

Oct. 1, 1831. compass and in a very short time, satisfactorily on both sides; and I cannot help thinking, that in the multitude of lights attempted to be thrown there is no light, but rather darkness visible, shed upon it. These Scotch cases are drawn most laboriously, and often unnecessarily so, and then all the points which are made in the cases are most elaborately argued at the bar. It is the custom of the country, and one difficult, perhaps, to break through. I hope, however, to see the day when the real point will be presented within a much more reasonable compass. No one probably cares to set the example, because he is apprehensive of not giving full satisfaction to his client; but I am sure that if it were known how much more satisfaction it affords to those whose duty it becomes to decide the case, the course I suggest would be pursued. I do not propose to your Lordships to give costs, and for this reason, that several of the learned judges entertained a doubt—not as to the language, but whether the intention could prevail in respect of the law of deathbed. But I am clearly of opinion that the interlocutors ought to be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—*Willoch v. Auchterlonie*, 14th Dec. 1769 (3339—*Rev.* 30 Mar. 1772); *Brack v. Hogg and Johnston*, 23d Nov. 1827 (6 S. & D. 113, ante p. 61.); *Couts v. Crawford*, 17th Nov. 1795, 3d Feb. 1801, (14,958 & App. Deathbed, No. 3,) House of Lords, 14th Nov. 1806 (12 F. C. 492, Note); *Batley v. Small*, 2d Feb. 1815 (F. C.); *Moir v. Mudy*, 2d March 1820, 2 Shaw App. p. 9; *Roxburghe v. Wauchope*, 25th May 1820; (2 Bligh p. 619;) *Lawson v. Stewart and others*, 29th Jan. 1826 (ante Vol. II. p. 625); *Pothier*, p. 87, sec. 205.

RICHARDS, CLARKE, and NARES—CURRIE, HORNE, and
WOODGATE, —Solicitors.

THE KING'S ADVOCATE, Appellant.—*Lord Advocate (Jeffrey)*. No. 55.

LORD DUNDAS, Respondent.—*Rutherford*.

Patronage—Prescription.—After the Reformation, when the Crown was in right of the possessions of the bishops, a royal grant was given of certain lands, &c. in Orkney and Zetland, which had constituted an earldom previously forfeited to the Crown, together with the whole patronages, including expressly those acquired in consequence of the Reformation, as well as those otherwise belonging to the Crown, all being united into a single earldom and lordship. This earldom was subsequently forfeited and annexed to the Crown; and thereafter, on the restoration of episcopacy, but without obtaining a dissolution of the earldom, there was conferred on one of the new bishops the bishoprick of Orkney, including all the patronages previously belonging thereto, and the teinds and kirks of certain parishes specially mentioned, the benefices of which were declared to be suppressed, and the teinds to belong to the bishop, under burden of planting and providing for ministers, and with a general right of patronage of vicarages. The bishoprick was enjoyed by the several bishops during the subsistence of episcopacy, and all rights belonging thereto reverted to the Crown at the Revolution. Thereafter a dissolution of the earldom having been obtained, and a new grant given:—Held (affirming the judgment of the Court of Session) that this grant formed a title of prescription, on which, if followed by possession, to prescribe against the Crown (as coming in place of the bishop) right to the patronage of the parishes specially contained in the titles of the bishoprick.

BEFORE the Reformation, the bishops of Orkney possessed various lands, together with the patronage of several churches, in the Orkney and Shetland Isles. There also existed an earldom of Orkney, which had reverted to the Crown, by forfeiture, prior to the year 1540. In 1565 Queen Mary conferred this earldom on her natural brother Robert Stewart. From the Bishop, (who continued after the Reformation to retain the temporalities of his see,) with consent of the chapter, Robert Stewart, in 1568, obtained to himself in liferent, and his eldest son Henry in fee, a grant of the bishoprick in feu, including the patronage of the churches within the same; and this grant was confirmed by a royal charter in 1585. In 1591, Robert Stewart, (on whom had previously been conferred the title of Earl of Orkney, with a grant of the former earldom,) obtained a new charter from King James, to himself in liferent, and Patrick, now his eldest son, in fee, not only of the rights belonging to the former earldom, but of all that had accrued to the Crown by the Reformation; and, in particular, including “the advocation,

Oct. 1, 1831.

2D DIVISION.
Ld. Mackenzie.

Oct. 1, 1831. “ donation, and right of patronage of all and sundry prelacies,
 “ dignities, parsonages, vicarages of kirks, prebendaries, chap-
 “ lainries, stewards, and of all other benefices ecclesiastical,
 “ founded and lying within the foresaid earldom and lordship,
 “ as well the patronages which pertained to our Sovereign Lord
 “ and his predecessors of old, as which pertained to ecclesiastical
 “ persons, and were lately devolved in his Majesty's hands by
 “ the laws and conditions of his realm.”

The whole subjects conveyed by this charter were united into an earldom and lordship, in which infeftment might be taken at the castle of Kirkwall; and the charter was confirmed by act of Parliament in 1592, which further declared the patronage of all the benefices within Orkney and Shetland to have remained with the earl since his first infeftment, and to belong to him in all time coming. There was, however, no special exception of these patronages in the act of revocation of grants of patronages, which was passed in the following year, 1593.

On the 1st of March 1600, Earl Patrick, who had succeeded his father, obtained from the Crown a charter nearly in the same terms with the one granted to his father:—“ cum advocacione,
 “ donatione, et jure patronatûs omnium et singularum prela-
 “ ciarum, rectoriarum, vicariarum, ecclesiarum, prebendarum,
 “ capellaniarum, stellariorum, aliorumque beneficiorum eccle-
 “ siasticorum fundat. et jacen. infra dictum comitatum et
 “ dominium et integra dominia de Orknay et Zetland, tam
 “ horum quorum patronatus nobis nostrisque predecessoribus
 “ perprius spectabant, quam episcopo Orchadie, et aliis personis
 “ et patronis ecclesiasticis, ab antiquo pertinebant, nuper in
 “ manibus nostris devenien., per leges, acta, et constitutiones nostri
 “ regni,” &c. In the month of May of the same year, (in order to include certain other lands belonging to him, but not forming part of the earldom,) Earl Patrick expedite a charter of resignation, in which were granted to him various lands, “ una
 “ cum advocacionibus, donationibus, et juribus patronatum
 “ omnium et singularum ecclesiarum, capellaniarum, et bene-
 “ ficiorum infra dictum episcopatum, prius ad collationem
 “ ordinarium episcoporum spectan., cum vacare contigerint.”

In February 1605, preparatory to restoring the order of bishops, effected in the Parliament of next year by the act 1606, c. 2, a royal presentation was granted in favour of James

Oct. 1, 1831.

Law, appointing him Bishop of Orkney and Zetland, and granting to him, during all the days of his life, all and haill the fruits, rents, &c. belonging to the said bishoprick, "or that in
 "ony time by gane sen the foundation of the said bishoprick,
 "hes belangit thereto as well temporalitie as spirituality thairof," and in particular the "advocatioun, donatioun, richt of patronage
 "of the personage and vicarage of all the commoun kirkis, and
 "utheris kirkis and beneficeis quhatsumever, perteining, possesst,
 "and occupyit of and be the bishops of Orkney and Zetland,
 "and their chapter, and quhilkis were at our Soveraine Lordis
 "presentatioun and donatioun of or befor, or perteining to ony
 "ane of thame, quhilk his Highness declares to be als sufficient
 "as gif the samen kirkis and ilk ane of them ware speciallie
 "expressit hairintill, sua that the said Maister James may pro-
 "vide the samen to sufficient and qualified ministers for serving
 "of the cuir at ilk ane of the saids kirkis; and fordir, his
 "Majestie, of his princelie and liberal dispositioun for the weill
 "and benefite of the said bishoprik, annexis, unitis, and incor-
 "poratis in the samen, all and haill the advocatioun, donatioun,
 "and richt of patronage of the personages and vicarages of
 "Orkney and Zetland, and of all uther benefices thair belangand,
 "to the chapter of the samen, quhilkis his Majestie haldis as
 "speciallie expressit hairintill, with the fruits, rents, emolu-
 "ments, teindis, and all utheris deuties thairof quhatsumever,
 "and ordainis the samen to be in all time hairafter ane part of
 "the privilege and patrimony of the said bishoprick; and the
 "said kirkis to be provydit be the said Maister James during
 "his lifetime, and after his deceis be the bishops his successoris
 "in the said place and living, to sufficient and qualified minis-
 "ters, notwithstanding whatsomever acts of Parliament maid in
 "the contrair." At the same time Queen Anne, with consent of
 King James her husband, executed in favour of Bishop Law and
 his successors in office a resignation of "all and haill the
 "fruitis, rentis, emolumentis, teinds, feu-mails, and cains, cus-
 "toms, casualties, deuties assignet and perteining to us of the
 "said bishoprik of Orkney and Zetland of the crop and zeir of
 "God 1604, and of all other years and crops to cum for ever."

The order of bishops was thereafter restored by the act 1606, which rescinded all prior dispositions by his Majesty of patronages belonging to bishopricks, except such as had been ratified in Par-

Oct. 1, 1831. liament; also excepting "all common kirks pertaining of old
 "to the said bishops and their chapter in common, which are
 "disposed by his Majesty to whatsoever person;" &c., and the
 act further provided, that all who had obtained feu rights or lay
 tacks of bishoprick lands, while they were permitted to retain them,
 should pay a reasonable sum to the bishop therefor.

On the 21st January 1607 a contract was entered into between
 Patrick Earl of Orkney and James Law the Bishop, whereby, on
 the narrative that "the said Master James is provided to the haill
 "bishoprick of Orkney, and to all lands and teinds, and rents,
 "honours, dignities, fees, privileges, casualties, profits, and duties
 "whosoever, pertaining and belonging thereto, for eschewing
 "and cutting away of plea, action, question, and controversie,
 "that by any occasion may arise betwixt the said earl and the
 "said bishop, for the profit and ordinar yearly rent of any lands
 "or teinds of the said bishoprick, contained in the said noble
 "earl's infeftment or tacks, and heretofore possessed and intro-
 "mitted with be him, the said Patrick Earl of Orkney as
 "principal, and Sir John Arnot as cautioner for him, bind and
 "oblige them to pay to the said Master James, Bishop of
 "Orkney, during all the days of his lifetime, the sum of 4,000
 "merks at Whitsunday and Martinmas by equal portions,
 "beginning the first term's payment at the term of Martinmas
 "last bypast 1606, and so forth yearly and termly thereafter, in
 "full satisfaction, complete payment, and contentation to him of
 "all right, title, and interest the said bishop may have, claim,
 "or pretend in and to the mails, farms, kains, customs, casual-
 "ties, profits, and duties whatsoever of all lands and teinds
 "whatsoever pertaining to the said Bishop of Orkney, or to any
 "part thereof, or to any other teinds of lands lyand within the
 "countrie of Orkney and Zetland whereinto the said bishop has
 "or may claim and pretend right and title during his lifetime.
 "Attour the said mightie earl, for establishing the estate of the
 "said bishop, is content, and for himself, his heirs and succes-
 "sors, contents that the said bishop, during his lifetime, shall
 "enjoy, bruik, and possess, conform to his said provision, the
 "superiority of the haill bishop's lands lyand in the said
 "countries of Orkney and Zetland, with the proper kirkis of the
 "same bishoprick, and patronage of all other kirks thereof, the
 "patronages of old pertaineing to the Bishop of Orkney, being

“ for the time, notwithstanding of any right or title made or
 “ granted to the said earl or his predecessors of the same at any
 “ time bygone, with this special provision always, likeas it is
 “ provided be express provision of this present contract, that
 “ the said superiority of the said bishop lands, with the proper
 “ kirks and patronage of the remanent kirks aforesaid, shall in
 “ noways be prejudicial or hurtfull to the said noble earl, his
 “ heirs, &c., in their heritable right of the lands, houses, offices,
 “ and others pertaining to the said bishoprick of Orkney, con-
 “ tained in their infestment thereof. It is also expressly provided
 “ hereby, that the said Master James, Bishop of Orkney, shall
 “ not trouble the present possessors of any benefices pertaining
 “ to them be virtue of his said provision to the said bishoprick,
 “ for any cause or occasion preceding the date hereof, but that
 “ they and every one of them may possess and enjoy the same,
 “ conform to their provisions in all points, but any question or
 “ impediment to be made be the said Master James on the con-
 “ trair; and then, if said benefits shall happen to vaict, that the
 “ said bishop, as patron foresaid, shall present and admit qualified
 “ persons thereto, be advise and consent of the said noble earl
 “ and his foresaids, and no otherwise. And likewise the said
 “ Master James, Bishop of Orkney, obliges him, during all the
 “ days of his lifetime, to suffer and permit the said noble earl
 “ and his foresaids peaceably to bruick and possess the hail
 “ lands, houses, teinds, rents, offices, privileges, duties, and hail
 “ commodities of the said bishoprick, conform to their infest-
 “ ments, tacks, rights, and possessions thereof, without any
 “ action, question, trouble, or impediment to be made by the said
 “ bishop or any other having right of him thereto. It is agreed,
 “ with consent of both the said parties, that the said noble earl
 “ and his foresaids shall content and pay to the ministers of
 “ Orkney and Zetland the hail thirds of the said bishoprick of
 “ Orkney, according to the particular assignations to be made
 “ and given be the said bishop or lords of the Parliament.”

Oct. 1, 1881.

In April 1611 King James granted to James Law the Bishop
 “ all and sundry the feu-mails addebted to our Sovereigne Lord
 “ of whatsoever lands, mills, woods, fishings, and others per-
 “ taining to his Highness' property within the lands of Orkney
 “ and Zetland, and other lands, isles whatsoever, pertaining to
 “ the earldom of Orkney, together with the feu-mails of all lands,

Cet. 1, 1831.

“ mills, woods, fishings, and others whatsoever pertaining to
 “ whatsoever chapelanries, prebendaries, stallaries, and other
 “ benefices within the bounds of Orkney and Zetland, and other
 “ lands and isles pertaining to the said earldom of Orkney.”

Earl Patrick was forfeited and executed in 1612, and thereupon the earldom was annexed to the Crown by act of Parliament, which enumerated among the rights belonging to the earldom so annexed “ the advocation, donation, and right of patronage of
 “ all benefices, chaplainries, and stallaries foundit and lyand
 “ within the boundes of Orknay and Zetland, kirkis, teindis,” &c., and declared that his Majesty should have no power to make any future grant of any part of the earldom without a dissolution of Parliament being first obtained.

In the same year (1612), the King having purchased for 300,000*l.* Scots from Sir John Arnott (the cautioner) and his sons, their rights and interests which they had appraised in Orkney and Shetland, an act of Parliament was passed, (1612, ch. 15,) annexing to the Crown the lands and others pertaining to the earldom, with the advocation, donation, and right of patronage of all benefices, chapelanries, &c. within the same.

A contract, followed by a charter of mortification in implement of it, was entered into in the year 1614 betwixt King James and the bishop, with consent of the provost and other canons of the cathedral church, proceeding upon the narrative of the disorder and confusion which had arisen among the tenants and inhabitants of Orkney and Zetland, which had mostly arisen from the confused lying of the lands within the said bounds, the uncertainty of the marches, and diversity of the superiors, (being partly holden of the King and partly of the Bishop of Orkney,) and whereby the bishop and his chapter resigned into his Majesty's hands, *ad perpetuam remanentiam*, all lands, kirks, teind-sheaves, salmon-fishings, teinds, &c., offices, jurisdictions, regalities, and haill privileges hereof, advocations, donations, and rights of patronages of kirks, altarages, prebendaries, stallaries, and other benefices, with all castles, towns, &c. pertaining to the Bishop of Orkney, to remain with his Majesty and his successors, as united, annexed, and incorporated into the patrimony of the Crown; for which cause his Majesty, (without however having previously obtained a dissolution of any part of the earldom annexed in 1612,) disposed to the bishop and his

Oct. 1, 1831.

successors, to remain with them in all time coming, as their proper patrimony, various lands, particularly therein narrated, lying in the parishes of Holme, &c., with all and sundry mills, woods, fishings, &c., with the teind-sheaves and other teinds, parsonage and vicarage, and other duties of the whole lands, &c. particularly and generally before mentioned, as well such as pertained of old to the said bishoprick as to any other dignitary, prebendary, chapelanry, channery, altarage, common kirk, or any other benefice whatever; which dignities, &c. his Majesty dissolved, suppressed, and extinguished, to the effect that all the foresaid teind-sheaves and other teinds, as well great as small, with the whole lands and others particularly and generally above mentioned, might remain with the Bishops of Orkney, as part of the said bishoprick, and property and patrimony thereof, in all time coming; providing the said bishop and his successors plant the kirks within the above bounds with ministers, and provide them with sufficient stipends, so that no part of the lands and teinds belonging to his Majesty be any way burdened therewith: and his Majesty made and constituted the Bishops of Orkney patrons of all vicarages within the isles, lands, and bounds of Orkney and Zetland, perpetually and in all time coming, disposing and mortifying to them the advocation, donation, and right of patronage of the said haill vicarages, with power to present qualified ministers to every one of the said kirks as often as the same should happen to become vacant. His Majesty also disposed to the Bishop of Orkney the right and jurisdiction of sheriffship and bailiary within the bounds of the said lands of new mortified to the patrimony of the bishoprick, and exempted the inhabitants within the bounds of the said lands from the sheriffs and other judges of the sheriffdom of Orkney; and his Majesty united and erected the whole lands and others therein enumerated into one whole free benefice and bishoprick, to be called then and in all time coming the Bishoprick of Orkney; and his Majesty also declared to be dissolved from the Crown all the rights thus erected into a bishoprick, and also cased and annulled all advocations, donations, and rights of patronages of whatsoever churches or benefices within the bounds of the said erected bishoprick, to the effect that the foresaid lands, mills, woods, fishings, &c. may remain with the said Bishop of Orkney

Oct. 1, 1831.

and his successors, as their own proper patrimony, in all time coming.

By this contract, relative acts of Parliament, and charter of mortification, &c., a new bishoprick of Orkney was created and erected, and in virtue thereof it was alleged that the bishop and his successors enjoyed and exercised the sole right to the patronage of the churches and parishes within the bishoprick, and in particular of the parishes of Holme, &c., until the abolition of episcopacy in or about the year 1639. On the other hand it was said, that notwithstanding the mortification of this bishoprick, the patronages in dispute remained a part of the earldom of Orkney, as confirmed by Parliament in 1592, and as inseparably annexed to the patrimony of the Crown in 1612; and that Parliament never having disannexed the earldom, or any part thereof, the mortification in favour of the bishop was only a temporary grant, which, when done away, left the earldom as it was in 1612.

After the forfeiture of Patrick Earl of Orkney the King had granted a lease of the earldom to Lord Ochiltree, under reservation of the lands, teinds, &c., and of the house appropriated to the bishop, with certain lands and teinds as equivalent to the assumed thirds of benefices; and it now appearing that these thirds were almost wholly allotted to the ministers appointed by the bishop, whereby “the haill remanent kirkis of Orkney being of his Majestie’s annexed property, are, for the most part, altogidder unprovydit, and these that have any thing at all hes yet so small means of maintenance, as no honest man will undertake to serve thame,” an overture was made by the commissioners for managing the King’s rents, and the bishop, wherein—“consideratioun being had upone the ane pairtt what great greiff our Soveraine Lord the King’s Most Gracious Majestie, no doubt, would conceive, if sick ane multitude of poor ignorant souls would perish for want of instruction, his Hieness being evir, in all his lyffe, a rare paragan of pietie, and so bountiful and beneficial to the kirk as not sparing his own coffeiris to restore and redeem their ruinat estait,”—and respect being had, on the other part, to the “hudge souns of money” the King had paid for Sir John Arnot’s rights,—it was recommended that certain of these other parishes should be

conjoined, and that a stipend of specified amount (the whole being 1,600*l.* Scots per annum) should be added out of the revenues of the earldom, on condition that this amount should not be increased, even on the expiry of the tack of the earldom. This overture having been approved of by the King, he granted a letter to that effect accordingly. The lease to Lord Ochiltree contained no mention of patronages which were exercised by the King himself, except in regard to the benefices suppressed in the mortification to the bishoprick.

Oct. 1, 1831.

On the abolition of episcopacy in 1638, the bishoprick of Orkney, including the patronage of the churches and parishes above mentioned, devolved upon the Crown; and, on 2d September 1641, King Charles granted in favour of Robert Leslie a tack for the period of two nineteen years of all and hail the lands, rents, &c. which belonged to the late bishoprick of Orkney, with power also to present to the hail vicarages within the hail isles, lands, and bounds of Orkney and Zetland belonging to the said bishoprick.

In November of the same year a charter of mortification was granted by King Charles in favour of the magistrates of Edinburgh of all and hail the rents, teinds, &c. lately pertaining to the bishoprick of Orkney.

In May 1642 the magistrates of Edinburgh acquired by assignation Leslie's tack; and in the same month they obtained a signature of confirmation ratifying the tack, assignation, and charter, and containing a new gift in their favour of all and sundry the hail lands, teinds, kirks, patronages, superiorities, offices of sheriffship, &c., whether pertaining to the said late bishoprick of Orkney, spirituality or temporality, and contained in the renewed foundations of the same; and this was ratified and confirmed in 1644 by act of Parliament.

William Earl of Morton having acquired from his Majesty, on the 15th June 1643, a right to the Earldom of Orkney, granted a declaration (22d June 1644) in favour of the magistrates of Edinburgh, that the contract betwixt his Majesty and him anent the earldom of Orkney and Zetland, and his infestment thereon and ratification thereof, should noways be extended to any lands, teinds, superiorities, offices, and others belonging to the late bishoprick of Orkney the time of the abolition of bishops, and

Oct. 1, 1831.

contained in the rights and infestments granted by his Majesty of the said bishoprick, &c. in favour of the town of Edinburgh.

Episcopacy having been again restored in 1662, the town of Edinburgh surrendered the bishoprick of Orkney to his Majesty. Thereupon an act of Parliament was passed, (26th August 1662,) whereby the town of Edinburgh obtained an imposition upon wine, upon the narrative, inter alia, that "they have freely surrendered to his Majesty the bishoprick of Orkney," and on 14th January 1664 a commission was issued, appointing Andrew Honeyman Bishop of Orkney, and giving to him "advocationes, donationes, et jura patronatum omnium ecclesiarum, rectoriarum, cappellaniarum, prebendariarum, altaragiorum, omniaque alia beneficia tam, spiritualitates quam temporalitates, quorum presentatio ullo tempore preterito ad episcopam de Orkney pertinuit, ante Reformationem religionis, postea, vel a fundatione ejusdem, vel eidem annexa fuit per quondam nostrum clarissimum patrem æternæ memoriæ, seu quocunque nostrorum illustrissimorum predecessorum."

The rights granted by that commission, and in particular the rights of patronage to the several parishes and churches libelled, were exercised by Andrew Honeyman and his successors until the Revolution in 1688, when the bishoprick estates, and patronages belonging thereto, devolved upon the Crown. The grant to the Earl of Morton had been renewed in 1662, when the King was again in right of the bishoprick; but in 1669 the grants in favour of the Morton family were reduced and set aside by a decree of the Court of Session, in respect there had been no previous dissolution in Parliament to authorize the Crown to make such grants; and this decision was followed by another act of annexation.

In the year 1707, an act (12 Feb.) was passed by the Scottish Parliament, on the representation of James Earl of Morton that those grants had been made in consideration of a debt of 360,000*l.* Scots due to his predecessor by Charles the First, by which the earldom of Orkney and lordship of Zetland, &c. were dissolved from the Crown and patrimony thereof, to the effect that her Majesty might dispense to the said James Earl of Morton, his heirs and successors whatsoever, the foresaid earldom, &c., redeemable, however, by her Majesty and her royal succes-

sors, on payment of the 360,000*l.* Scots, subject to a feu duty of 6,000*l.* Scots, and the payment of 1,600*l.* Scots to the ministers, or such other sums as should be modified out of the teinds. Oct. 1, 1831.

In consequence of this act of dissolution a charter (18 Feb. 1707) was expedie by James Earl of Morton, conveying to him the earldom, under these burdeus, with all the privileges, &c., advocations, donations, and rights of patronage of the kirks within the said earldom and lordship, isles, udal lands, and others pertaining thereto, upon which the Earl of Morton was infest; and an act of the Scottish Parliament (12 Mar. 1707) was passed, ratifying the charter and sasine.

In 1742 an act of Parliament of Great Britain was passed, disannexing the earldom and lordship, with the whole patronage, so as his Majesty might grant the same of new, free of the right of redemption, to the Earl of Morton, irredeemably for ever. A charter (Sept. 1743) was expedie, in virtue of this act of Parliament, in the same terms, upon which the Earl of Morton was infest.

Sir Lawrence Dundas in 1766 purchased the earldom and lordship from James Earl of Morton; and obtained a charter of resignation from the Crown on the 6th of August 1766, containing the whole lands, feu farms, and others specified in the Earl of Morton's charter, "*cum advocacionibus, donationibus, et juribus patronatum ecclesiarum, capellaniarum, altaragiorum, et prebendariorum infra dict. comitatum et dominium, insulas et udal terras, aliaq. ad ead. spectan.;*" upon which charter Sir Lawrence was infest.

In virtue of the above titles derived from the Earl of Morton, Lord Dundas the successor of Sir Lawrence claimed right to the patronage of all the churches in Orkney and Shetland, with the exception of that of Kirkwall and St. Ola, which was claimed by the magistrates of Kirkwall, founding on certain alleged royal grants prior and posterior to the Reformation. A claim was likewise made by Robert Heddle of Melsetter to the patronage of Walls. On the other hand, the patronage of all the churches was claimed by the Crown, as coming in place of the bishops of Orkney. To have this matter settled, his Majesty's Advocate in 1825 brought an action of declarator against Lord Dundas, the magistrates of Kirkwall, and against Mr. Heddle of Mel-

Oct. 1, 1891.

setter, to have it found that all the patronages belonged to the Crown.

In support of this claim it was pleaded —

1. By the contract betwixt King James and Bishop Law and charter of mortification in 1614, and relative acts of Parliament, the several parishes, and the rights of patronage, were incorporated into the bishoprick and conferred on the bishop; and all former grants or rights were annulled. These rights of patronage thenceforth remained part of the bishoprick, and were never afterwards disjoined therefrom, but devolved upon the Crown upon the abolition of episcopacy in or about 1639. After the abolition of episcopacy, the bishoprick, including the rights of patronage, was granted by the Crown to the magistrates of Edinburgh, by the several deeds and acts of Parliament condescended on, and was enjoyed and exercised by the magistrates until about 1662, when the bishoprick was surrendered entire to his Majesty, whereby the rights of patronage in question were re-acquired by the Crown. But while the bishoprick was thus held by the magistrates of Edinburgh the earldom of Orkney was held in virtue of a separate title by the Earl of Morton, and did not comprehend the rights of patronage in question. After the bishoprick, including the rights of patronage, had been re-acquired by the Crown from the magistrates of Edinburgh, the rights of patronage pertaining to the bishoprick were conferred on Bishop Honyman in 1664, and were enjoyed and exercised by him and his successors till the Revolution, when the bishoprick, including the patronages, devolved upon the Crown; and by the statute 10th of Queen Anne, c. 12, the patronages were declared to belong to the Crown; and it does not appear that they have since been granted by the Crown to the defenders, or any other person; consequently the rights still remain with the Crown.

2. The titles founded on by Lord Dundas do not convey or carry any part of the bishoprick as constituted in 1614; and, in particular, do not convey or carry any of the patronages in question. These titles are not even sufficient to found a prescriptive right to the patronages in question, which constitute no part of the earldom of Orkney. There are no acts of possession condescended upon as having been exercised by Lord

Dundas and his predecessors which can establish a prescriptive right to the patronages. Oct 1, 1831.

3. The titles founded on by the magistrates of Kirkwall and separately by Heddle were not sufficient to carry right to the patronages claimed by them, nor have they condescended on any acts of possession exercised by them sufficient to support their claim.

4. But even if the alleged acts of possession by the different defenders were established, they could be of no avail, seeing that there was a contrary possession by the Crown and the bishops. The Crown has right to all patronages to which no right can be made out by a subject, and cannot suffer by the negligence of its officers.

Lord Dundas maintained—

1. The act 10th of Anne, c. 12, does not apply to these patronages, which formed part of the earldom of Orkney; and as the defender, his authors and predecessors, had possessed them in virtue of their charters and infeftments for upwards of a hundred years, and had, during that time, uniformly exercised the right of presenting to them when vacant, and enjoyed the revenues and emoluments thereto pertaining, and had exercised every other act of lawful possession proper to such subjects, peaceably and without interruption, his title to them was confirmed by the statute 1617, c. 12, which declares that possession, by virtue of infeftments standing together for forty years, shall give an unquestionable right, good against all objections, and even against the King. The defender being in the lawful possession of the patronages, the proof of showing a contrary possession is incumbent on the pursuer; but he has not condescended on any exercise of his pretended right within the years of prescription.

The magistrates of Kirkwall pleaded—

1. The positive prescription extends to patronages as well as other heritable rights, and the law does not recognize in favour of the Crown any exception from its operation; and as the magistrates of Kirkwall, in virtue of their titles, had enjoyed the possession and exercised the right of patronage for upwards of forty years, they had effectually established their right by the positive prescription.

Oct. 1, 1831.

Besides, no title had been produced on the part of the Crown, as in right of the bishops of Orkney, sufficient to found any claims to the patronage of Kirkwall and St. Ola, which was evidently not included in the grant to the bishops.

At all events the titles produced on the part of the Crown, as in right of the Bishop of Orkney, amounted to nothing more than a general conveyance to patronages, and were insufficient, unless explained by continued and prescriptive possession and exercise of the right, to form a title to any particular patronage, and consequently cannot compete with the defenders' titles, which contain a direct and special conveyance to the patronage of Kirkwall and St. Ola; and the proof of such possession, as in right of the bishops of Orkney, is incumbent on the pursuer, who is not entitled, till he establish such possession, to deny effect to the special grants in favour of the defenders, or to require any evidence of possession or exercise of right on their part.

But though the pursuer, in the circumstances of the case, were entitled, under the general grants in favour of the bishops of Orkney, to challenge the validity and effect of the defenders' titles, and to require them to support those titles by evidence of possession on their part, the defenders' preferable rights would be clear, in virtue of their possession, and that at common law, and independently of their plea of positive prescription under the statute 1617, c. 12.

Heddle pleaded—That the patronage of Walls was included, *nominatim*, in a charter by progress in favour of his author, in 1591, and was not affected by the Act 1593, c. 19, which applied only to new grants of patronages: That the patronage was not, *nominatim*, conveyed in, and was not, by possession, specially made to come under the general titles of the pursuer, while Heddle's express title was put beyond challenge by prescriptive possession.

The Lord Ordinary (15th May 1829) found, “ That there
“ appears to be in the defender Lord Dundas a sufficient title for
“ prescription of the patronage of the eight parishes libelled, with
“ the exception of the patronage of Kirkwall and St. Olla;
“ finds, that there appears to be in the magistrates of Kirkwall
“ a sufficient title for prescription of the patronage of the parish
“ of Kirkwall and St. Olla; and appoints the cause to be

“ enrolled, in order that the parties may be heard upon the ad-
 “ missions or evidence of possession in reference to prescription
 “ of the above patronages; and in respect to the defender
 “ Mr. Heddle, and his claim to the patronage of the parish of
 “ Walls, supersedes further consideration, until the question
 “ between the pursuer and Lord Dundas, as in regard to that
 “ parish, shall be further considered.—Note.—There is no
 “ process here to try the question between Lord Dundas and
 “ Mr. Heddle; but if Lord Dundas can show sufficient right to
 “ exclude the Crown, the action by the Crown against Mr. Heddle
 “ must fall.”

Oct. 1, 1831.

The Lord Advocate reclaimed, but the Court (18th May 1830) adhered. *

This being merely of the nature of an interlocutory judgment, as the question of possession had not been disposed of by the Lord Ordinary, it became necessary for the Lord Advocate to apply for leave before he could enter an appeal against it to the House of Lords; and in order to obviate any opposition on the part of the defenders to this proceeding before the cause was finally exhausted, he gave in a minute, “ admitting that the
 “ judgment of the Court on the question of prescription is to
 “ decide the cause between the parties, and that no subsequent
 “ question as to possession remains undisposed of.”

On which he obtained leave to appeal.

Appellant.—Besides the reasons already given, the judgment appealed from cannot possibly be supported upon any ground which does not necessarily infer that the rights and possessions of the bishoprick were undistinguishable from the rights and possessions of the earldom. But any such notion is equally erroneous in principle, and inconsistent with the fact. The grounds of the judgment appealed from, as stated by one of the Judges of the Court of Session, would unquestionably import, that the grant founded upon by Lord Dundas gave him the title to all the bishoprick lands, as much as of the bishoprick churches; and yet no such claim or pretension was ever brought forward on the part of Lord Dundas. The bishoprick reverted to the

* 8 Shaw and Dunlop, p. 755, where the Judges opinions will be found.

Oct. 1, 1831.

Crown, but it was a separate estate from the earldom; and when Lord Morton obtained, by favour, a restoration to the grant of the earldom, which had been previously reduced, nothing was truly granted to him, and nothing could be within the contemplation of the grant, but the earldom. Two of the other Judges appear to have taken a different view of the case, and held merely that the grant of the defender Lord Dundas was a title for prescriptive possession, because the terms were general. But this is not a sound construction of the grant. If it is quite clear that the grant was limited to the earldom, then the words employed can only be referable to the subject matter of the grant. The whole general expressions are necessarily limited by the nature and objects of the grant, which was merely to restore Lord Morton against the decree of reduction.

Respondent.—*Lord Dundas*, in addition to his arguments in the Court below, pleaded—

He is feudally invested with the right to the patronages claimed by the appellant. These patronages are comprehended in the grant of the earldom of Orkney and lordship of Zetland to Lord Morton in the year 1707, and in the relative act of Parliament, and the right to them has been transmitted, by regular titles, from Lord Morton's family to the respondent. The respondent's titles alone, unaided by prescription, and independently of the effect of possession, in explaining the import and meaning of the original grant to Lord Morton, establish, beyond all doubt, his right to these patronages. The title on which the appellant's claim is founded is excluded by the positive enactments of repeated statutes, repealing and annulling all those intermediate grants of portions of the earldom of Orkney and lordship of Zetland, which were made by the Crown between the years 1612, when they were first annexed to the Crown, and the year 1707, when the right to them was finally granted to Lord Morton. The claim of the appellant rests entirely on the temporary rights granted during that intermediate period; but these temporary grants were entirely swept away by the statute 1707, dissolving from the Crown the lordship and earldom, as it had been originally annexed to the Crown by the act of annexation in the year 1612.

Oct. 1, 1891:

The admission made by the appellant as to the possession of these patronages, and consequently of the acquiescence on the part of the Crown in a state of possession totally adverse to the plea now maintained by the appellant, is extremely material, in so far as it affords evidence of a very authoritative kind in the interpretation of the grant to Lord Morton, and of the respondent's right to these patronages in virtue of his titles alone.*

LORD CHANCELLOR.—My Lords, I have looked carefully into the documents in this case, as well as into the elaborate opinions of the learned Judges in the Court below, especially of Lord Cringletie, who goes very much into the case. I have checked his account of the documents with the originals; and, with the exception of one or two unimportant particulars, I have come to the same conclusion, in point of fact, which the learned Judges had come to—that there is a title either in the original grant to Patrick Stewart Earl of Orkney, in 1565, or the subsequent grant confirmatory of the former to Lord Robert Stewart, in 1592. I agree with their Lordships, that there is a sufficient conveyance of the kind of property in question to give a title whereupon the party may prescribe, the rule of the Scotch law differing from ours, in requiring a title whereupon to prescribe; but it is not the rule of the Scotch law that the title shall contain a complete conveyance of the subject, which is the sort of argument that has been urged here; for then, what would be the use of prescription?—But there are words sufficient—livings, advowsons, chapelries, and so forth—in these instruments, upon which the prescription shall run, and upon which the prescription, by affixing a definite meaning to these words, shall exclude one set of advowsons where there has been no enjoyment, and shall infer a valid title where there has been an enjoyment—an uninterrupted enjoyment—on others. There being no doubt that *jus patronatus* comes within the Statute, and is the subject of prescription—indeed that being now conceded—I hold the production of these documents, and an exercise of right for a couple of hundred years, to suffice for the purpose required. I therefore move your Lordships, that the interlocutors of the Court below, in this case, be affirmed.

* The respondents, magistrates of Kirkwall, and Heddle, repeated their arguments in the Court below.

Oct. 1, 1831. . The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities.—Stat. 1471; 1540; 1593, c. 19; 1606, c. 2; 1612, c. 14, 15, 16; Peterkin's Rentals of Orkney, p. 66; No. 3, p. 34; App. p. 99; 1669, c. 19; 1707, c. 46; 10 Anne, c. 12, sec. 4; 2 Stair, 8, 35; 1 Ersk. 5, 10.

Authorities for Lord Dundas.—1592, c. 94; Record Edit. p. 1; 1606, c. 2; 1612, c. 15; 1669, c. 19; 1707, c. 9; Act 1742; Cochrane, 21st Jan. 1739 (M. 9,909); Graham, 17th Jan. 1758 (M. 9,927); Act, 1594; 1617, c. 12; Earl of Leven, (M. 10,930); 2 Ersk. 6, 18, 3; 3, 23; 3 Ersk. 7. 3. 4. 31; 1, 5, 16; 2 Stair, 1, 24; 3, 45; 12, sec. 23; 8, sec. 35, 1, 8, 35; 2 Craig, 8, 37; Earl of Argyle, (M. 9,631); Duke of Buccleuch, Nov. 30, 1826 (5 S. & D. No. 44); 1712, c. 10.

Authorities for Magistrates of Kirkwall.—1670, c. 42; 1617, c. 12; 2 Stair, 12, 23; 3 Ersk. 7, 3.

MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 56.

DONALD ROBB, Appellant.

JAMES FORREST, Respondent.

Bankruptcy—Sequestration—Stamp.—Held (affirming the judgment of the Court of Session)—1. That it is competent for a creditor to apply for sequestration, whose debt is of the statutory amount, but consists partly of a sum originally due to himself, and partly of a debt purchased by him at an undervalue, subsequent to the bankruptcy: 2. That the assignation of such a debt requires to be written on a deed, and not on an ad valorem stamp: 3. That as no objection was taken to the assignation, in respect of its being written on a wrong stamp, until after sequestration was awarded, and as there was no room to suppose that the Court was aware of the objection, and as the defect was afterwards supplied, the sequestration was valid.

Oct. 3, 1831.

1st DIVISION.
Lord Newton.

ROBB presented a petition to the Court of Session, praying for a recal of the sequestration of his estates which had been awarded at the instance of Forrest under the Bankrupt Act. This he did on the following grounds:

1. The debt of Forrest, the sequestrating creditor, was not of the statutory amount to entitle him to present the application. It was stated in his affidavit as amounting to 135*l.*, but of this 55*l.* consisted of an account originally due to Young and Company, and assigned by them, subsequently to Robb's bankruptcy, for 18*l.* This purchase was illegal, as being, after bankruptcy, for

Oct. 3, 1831.

an inadequate price ; and collusive, as enabling a creditor to carry through a sequestration in circumstances which the law did not contemplate ; and, if sanctioned, would enable creditors in small sums, by the assignment of their claims, to apply for sequestrations on all occasions, and to evade the provision in the statute by which the amount of the petitioning creditor's debt is determined :

2. The assignation by Young and Company was null and void, as bearing to be an assignation from Young and Company, and the individual partners of the Company, while it was only subscribed by Thomas Young and Company, and not by the individual partners :

3. And the assignation was null, as being extended on an *ad valorem* instead of a common deed stamp.

The Lord Ordinary on the Bills having refused the petition, Robb reclaimed.

The Court, before answer, remitted to the Solicitor of Stamps and to the Deputy Keepers of the Signet to report as to the practice in Scotland as to using *ad valorem* stamps or common deed stamps in the preparation of such assignations as the one in question. The report was returned, that “ upon a transaction “ such as the one in question it is the usual practice of convey- “ ancers to write the assignation upon a *valorem* conveyance “ stamp.” Thereupon the Court repelled the other objections, but ordered Cases upon the objection in regard to the stamp. Forrest now sent the assignation to London to be stamped, where it was accordingly stamped with a common deed stamp of 35*s.*, over and above the previous stamp of 10*s.* The Court then, “ in re- “ spect the deed is now produced stamped, recalled the order for “ cases ; refused the prayer of the reclaiming note ; and adhered “ to the interlocutor of the Lord Ordinary complained of, in “ toto ; and remitted to the trustee to consider how far the de- “ fender's expenses of process, with one half of the expense “ incurred in procuring the report of the Solicitor of Stamps “ and Keeper of Signet, ought to be defrayed out of the seques- “ trated estate.”*

* 8 Shaw and Dunlop, pp. 839 and 1035.

Oct. 3, 1831

Robb appealed. No appearance was made for the respondent.

Appellant.—1. There is no lawful evidence that the respondent was a creditor who had a debt owing to him to the extent required by the statute. The deed of assignment, said to have been granted by Thomas Young and Company, in favour of the respondent, was not validly or legally executed, so as to transfer their debt to the respondent; and at the time it was produced and founded on it was written upon a wrong stamp, and could not therefore, even if valid in other respects, bear faith in judgment, or be founded on, and made the ground for awarding sequestration. It was irregular and incompetent to remit to the Solicitor of Stamps and Deputy Keepers of the Signet to report as to this point, and to affirm an interlocutor which (by the very circumstance of the subsequent stamping) is admitted by the Court of Session to have been erroneous at the time it was pronounced.

LORD CHANCELLOR.—My Lords, this is a pauper case, in which the means of the unfortunate appellant have been completely exhausted by the expense of the litigation, and he has been obliged to come here in formâ pauperis. No person appears in support of the judgment, those concerned on the part of the respondent deeming that the grounds of that judgment were so clear as to require no argument in its support; but in fact the better reason (for the former turned out, in the event, to be by no means sufficient) was the extremely small amount of the matter in litigation. The question is, whether, in a bankruptcy, (or, as it is called in Scotch practice, a sequestration,) there had been, or not, a sufficient debt to support the prayer for the sequestration,—what we should call in bankruptcy a sufficient petitioning creditor's debt. Various objections were taken in the Court below and here in last resort, and they ultimately resolved themselves chiefly into one; that a certain instrument of assignation, necessary to make up the debt to the hundred pounds required (the amount without that being only about 80*l.*), was defective. It was objected to on various grounds, with only one of which I will trouble your Lordships, and that was one which induced me to postpone moving judgment, because I conceived that the case had not been sufficiently considered in the Court below. The instrument, it appears, was not upon the proper stamp; it was on an *ad valorem* stamp.

Oct. 3, 1831.

whereas it ought to have been on a deed stamp. This point does not appear, I say, to have been sufficiently attended to below. If any proceeding had been instituted, in which the rights of the parties were in question, and it had been necessary to rely upon that instrument, the proceeding must have failed as respected the party producing it, and resting his case upon it, because it had not a sufficient stamp. But then the proceeding in question was of a peculiar kind. A petition was presented. Your Lordships know that the law of Scotland differs materially from ours in this, that we make a man a bankrupt behind his back, without any rule to shew cause, as it were, but in Scotland they proceed against him upon notice, and after the delay of ten days the sequestration is awarded. They state in the record the ground of the debt, and, among others, this assignment. This unstamped instrument was a necessary part of the record, but no objection was taken; and after a lapse of the proper time the sequestration was awarded; and then, within sixty days, there still being no objection taken, or, if taken, got over by the after stamping of the instrument—it is perfectly immaterial to the case which—the instrument, before it was required to be used in the process, and before it was objected to, and came to be considered in foro contentionis, was stamped; the defect was cured in the proper quarter, and the instrument was validly produced. My Lords, upon these grounds I am of opinion, an opinion I have come to after considerable delay and much consideration of the case, that as there was no objection taken in the first instance, and as the Court allowed the instrument to be given in evidence, and proceeded upon it without taking the objection to the stamp, one of two things must have happened, either that the Court was not apprised of the fact that the stamp was insufficient, or that, if the Court was apprised of it, the party consented against whom it was produced. If the Court was apprised of the objection, and if, that objection being taken, the instrument was received, (and I mention this to show on what a very narrow edge, as it were, the validity of the judgment turns,) then the judgment ought clearly to be reversed; and I make this observation; but I have looked, and with much anxiety, into the case, and I see no sufficient reason to believe that the Court was apprised of the objection. We therefore come to this alternative, either that the Court (and this proceeding being in the absence of the respondent, we cannot precisely ascertain the fact,) was not aware of its being on a wrong stamp, or that no objection was taken, and that, by consent, this instrument was admitted in evidence. In either case, I am of opinion that it is too late now to take the objection, or rather, that it was taken too late in the Court below; for when the objection was at length taken the defect of the stamp was remedied. Then the question is, whether the Court does

Oct. 3, 1831. its duty, with reference to the revenue law, if it allows the parties to cure such a defect by consent; and my opinion is, clearly, that it does not do its duty. But still, though the Court may have been wrong in not refusing the evidence in spite of the consent to its being received, that may not be a ground for depriving a party of his judgment. The English judges hold, that consent does not cure the defect of stamp, and that they are bound to protect the revenue; and your Lordships will plainly perceive that the revenue law would become a dead letter if the parties to an instrument might beforehand preclude themselves from taking advantage of the objection, allowing an unstamped instrument to be executed, and afterwards given in evidence, without objection; but the Court, to prevent this collusion of parties, say, we will protect the duties, and not allow the parties to waive. But I am of opinion that in this appeal, for setting aside the judgment below, given in consequence of the Court not attending to the want of stamp, it is too late to complain. So it would be at Nisi Prius here, which furnishes an analogy to the proceedings in this case. If a judge at Nisi Prius, contrary to what is understood to be his duty, and not protecting the revenue law, chose to receive an unstamped instrument in evidence—if he did it against the consent of the other party, that would be a ground for a new trial;—if he did it with the consent of the other party, it would be only a ground for saying that he did not do what he ought to do, but it would be no ground for a new trial. But, my Lords, I see no reason in this case to believe that the Court did act with the consent of the parties. We have no right to impute that error to the Court. For any thing that appears, the Court was not apprised of this defect in the instrument; and there is therefore not only no ground for reversing the judgment, but no ground for imputing neglect to the Court. I am bound, to believe that fact, which I have taken the best means in my power to ascertain, in the absence of counsel for the respondent.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

EVANS, STEVENS, and FLOWER,—Solicitors.

JOHN NAPIER and Mrs. SCOTT, Appellants.—*Spankie—Wilson*, No. 57.

Lady GORDON and others, Respondents.—*Sandford—
Rutherford*.

Bankruptcy—Husband and Wife—Interest.—1. An estate was sold under burden of the price, being 60,000*l.*, and the interest of 10,000*l.*, being part of the price, was to be liferented by the purchaser, (who had married the daughter of the seller,) and the purchaser became bankrupt, and the estate was judicially sold, and produced a sum inadequate to pay the price:—Held, in a question between the three daughters of the seller as heirs-portioners (affirming the judgment of the Court of Session), that two of them were entitled to be ranked on the interest of the 10,000*l.*, to the effect of realizing full payment of their shares of the price, to the exclusion of their sister during the life of her husband the purchaser. 2. Circumstances in which (affirming the judgment of the Court of Session) interest on arrears of interest was allowed from the next term after the date of citation of the holder of a fund in a multiplepinding of which he was the nominal raiser.

GLENDONWYN of Parton, by minute of sale, dated 22d April 1809, sold to William Scott, his son-in-law, the lands and barony of Parton and others for 60,500*l.*; 20,500*l.* to be paid on a year's notice; 30,000*l.* to be payable a year after Mr. Glendonwyn's death; and the remaining 10,000*l.* to be secured to Mr. Scott and Mrs. Scott in liferent, and to the children in fee; also 4,000*l.* part of the 30,000*l.* was declared to be the absolute property of Mrs. Scott. The minute bore, " That during the
" life of the said William Glendonwyn, no interest shall be
" payable by the said William Scott upon the remaining sum of
" 10,000*l.* sterling; which principal sum of 10,000*l.* sterling is
" to be secured to the said William Scott and Mrs. Ismene
" Magdalena Glendonwyn, spouse of the said William Scott,
" in manner following, viz. the interest of the said sum is to
" be liferented by the said William Scott and Mrs. Ismene
" Scott, his spouse, during their lives, and during the life of the
" survivor of them, and the said principal sum of 10,000*l.* to be
" the property of and divisible amongst the issue of the marriage,
" male and female, as their said parents may jointly direct by
" any settlement under their hands, &c. And, farther, the said
" William Glendonwyn promises, out of the said interest, to pay
" to his daughter, the said Mrs. Ismene Magdalena Glendonwyn
" Scott, during his life, the sum of 200*l.* sterling yearly, for her

Oct. 3, 1831.
1st Division.
Lord Newton.

Oct. 3, 1831.

“ own separate use, free from the debts or control of her pre-
 “ sent or any future husband, as in the nature of pin-money :
 “ And farther, that the said sum of 200*l.* sterling yearly is to be
 “ secured to the said Mrs. Ismene Magdalena Glendonwyn Scott
 “ in like manner, by the principal sum of 4,000*l.* sterling being
 “ retained out of the said sum of 30,000*l.* sterling ; and the said
 “ sum of 4,000*l.* shall be the absolute property of the said
 “ Mrs. Ismene Magdalena Glendonwyn Scott, and which she
 “ shall have the power of conveying and settling at her pleasure,
 “ to take effect after her death : Declaring always, that the dis-
 “ position to be granted by the said William Glendonwyn, of
 “ his lands and estates in the parish of Parton, shall be specially
 “ burdened with the payment of the foresaid price of 60,500*l.*
 “ sterling, and all interest to become due thereon, payable in
 “ manner before stipulated ; and the same shall remain a real
 “ lien and nexus over the said lands and estates, and preferable
 “ to all other debts and deeds.”

Glendonwyn died in June 1809 ; his three daughters, Lady Gordon, Mrs. Scott, and Miss Glendonwyn, succeeded as heir-ess-portioners to the estate ; and as their father had not executed a disposition, they, in 1811, granted a conveyance in favour of Scott, declaring the lands to be burdened with the price as a real burden. Scott entered into possession, and having become indebted to Napier, as representing the Galloway Bank, granted him an heritable bond for 15,000*l.*, and in further security of this sum, Mrs Scott, with consent of her husband, for his interest, assigned to Napier her third share of the price of the estate, and the 4,000*l.* Napier subsequently received another heritable bond for 10,000*l.* from Scott, in security of which Mrs. Scott executed a similar assignation.

On 7th January 1814, Napier purchased from Scott the lands of Barwhillanty, part of the lands of Parton, at the price (as afterwards fixed by arbiters), of 14,830*l.* bearing interest from 22d November 1813, the date of Napier's entry. Scott afterwards became insolvent, and a process of ranking and sale was raised in 1818. Subsequent to the raising of the action of ranking and sale a process of multiplepoinding was brought in the name of Napier, for the purpose of having the price of the lands of Barquhillanty distributed among the several creditors. As the fund in medio in this process was to be divided among the same

Oct. 3, 1831.

body of creditors with the price of the rest of the estate, Napier consented to a conjunction of the processes, to the effect of having one scheme of division calculated on the whole fund.

After the lands had been sold (part of which was bought by Miss Glendonwyn) a decree of ranking was pronounced in 1827, “ preferring the creditors, &c. upon the prices of the said “ lands and estate of Parton sold at the judicial sale thereof, and “ interest due thereon, and also upon the sum of 14,830*l.*, the “ price of the lands of Barquhillanty, being the fund in medio “ in the said multiplepoinding at the instance of the said John “ Napier, and interest due thereon,” and a remit was made to an accountant to draw up a scheme of division.

This was done, and the division was proposed to take place as follows: By the accountant’s report, 1. The heritable creditors were to be paid off in terms of their preferences. 2. The 4,000*l.* destined to Mrs. Scott was to be paid out of the first part of the lands purchased by Napier. 3. The interest of the 10,000*l.* destined to Scott’s children was to be divided equally among Lady Gordon, Miss Glendonwyn, and Mrs. Scott. 4. The principal sum of 10,000*l.* was to be paid to Lady Gordon, Miss Glendonwyn, and Mrs. Scott, to be held by them in security of the interest, and in trust for the children of Mrs. Scott, who had the fee of it; and, 5. The residue of the price of the lands was to be set apart to these ladies. An interest was accumulated on the price of Barwhillanty, as at Whitsunday 1820. The scheme of division was objected to by the whole parties.

Napier insisted that the interest of the 10,000*l.* during Mr. and Mrs. Scott’s lives belonged to him in terms of his assignations already mentioned: That he was not bound to pay or consign any part of the price of the lands which had been allocated to Mr. and Mrs. Scott till his claims against them were ascertained, as he claimed not only the interest of the 10,000*l.*, but the 4,000*l.*, and the residue of 8,079*l.* 17*s.* 11*d.*, being the share of the residue belonging to Mrs. Scott, as an heir-portioner, and that there should be no accumulation of interest of his price at Whitsunday 1820.

Mrs. Scott pleaded that the 4,000*l.* destined to her by her father should be allocated in such a manner as to be secured over the lands, to yield her the annuity of 200*l.*, which her father intended

Oct. 3, 1831. her to have, and to be free from Napier's claims:* That the principal sum of 10,000*l.* should not be paid to the heirs-portioners, but should be heritably secured, so that the interest, or at all events a third part of it, might during her husband's life be applied in liquidation of any deficiency which might accrue on her share as an heir-portioner of the residue of the price, and on his death that the entire interest should be payable to her if she survived him; and the fee after their deaths to go to the children.

Miss Glendonwyn (along with Crombie, who alleged that he had right to Lady Gordon's share,) maintained, that as Mrs. Scott's husband was debtor for the price, and as he had right *jure mariti* both to the interest of the 10,000*l.* and of the third part of the price belonging to Mrs. Scott as an heir-portioner, she could not claim that interest, and they were entitled to be preferred to it, in order to liquidate *pro tanto* any deficiency arising on their shares of the price.

“ The Lord Ordinary repels the whole objections to the account-
 “ ant's report, with the exception of that made to the proposed pay-
 “ ment to Mr. Crombie for 3,333*l.* 6*s.* 8*d.*, being one-third of the
 “ sum of 10,000*l.*, belonging in fee to the said children; sustains
 “ the said objections; and finds that as this sum must continue
 “ in the meantime to be a burden on the lands, Mr. Napier and
 “ Miss Glendonwyn are entitled to retain it in the proportions
 “ allocated on their prices, on granting heritable bonds in secu-
 “ rity of the same; the bond by Mr. Napier to be for payment
 “ to the children of the principal sum of 6,666*l.* 13*s.* 4*d.* at the
 “ death of the longest liver of Mr. and Mrs. Scott, and for pay-
 “ ment, during the lifetime of Mr. Scott, of the interest of one
 “ moiety, or of 3,333*l.* 6*s.* 8*d.* to Mr. Crombie, as trustee of Lady
 “ Gordon, and of the interest of the other moiety to Mrs. Scott,
 “ as one of the heirs-portioners of the late Mrs. Glendonwyn, or
 “ to those in her right as such; and if she shall survive Mr. Scott,
 “ for payment to her, or those in her right, under her father's
 “ settlement, of the interest of the whole sum of 6,666*l.* 13*s.* 4*d.*
 “ from the time of her husband's death to the termination of her
 “ liferent; and the bond by Miss Glendonwyn to be for payment

* Pending the proceedings she raised an action for setting aside the deeds granted by her in favour of Napier.

“ to the children of the sum of 3,333*l.* 6*s.* 8*d.*, being the remain-
 “ ing third retained by her at the death of the longest liver of
 “ Mr. and Mrs. Scott, and for payment of the interest only which
 “ may fall due after Mr. Scott’s death; which interest, if
 “ Mrs. Scott survive, shall be payable to her, or those in her
 “ right, under her father’s settlement, so long as she lives; and
 “ in respect the claim of Mr. Napier, as a riding interest, on the
 “ sums to which Mrs. Scott may be preferred, is uncertain, and
 “ contingent upon the issue of the reduction at her instance, and
 “ that the lands purchased by him cannot be considered as an
 “ adequate security for the prices, and the large sum of interest
 “ due upon them, nor, indeed, for more than the original prices
 “ themselves, ordains them, betwixt and the ensuing term of
 “ Whitsunday, to consign in the Bank of Scotland, Royal Bank,
 “ or with the British Linen Company, the whole interest due by
 “ him on these prices, up to the term of Martinmas last; and
 “ with these findings, approves of the report, and decerns in
 “ the division, and for payment accordingly.”

Oct. 3, 1831.

This interlocutor having been taken before the Court, their Lordships remitted the case back to the Lord Ordinary to reconsider his interlocutor, and thereafter (July 11, 1829) his Lordship repelled “ the objections to that part of the report
 “ which assigns to the heirs-portioners of the late Mr. Glendonwyn
 “ the interest due, or which may become due during Mr. Scott’s
 “ life, on the sum of 10,000*l.* belonging in fee to his children by
 “ Mrs. Scott; finds, that as the right of the heirs-portioners to
 “ this interest arises from the failure of Mr. Scott to pay to them
 “ the stipulated price, which is declared a real burden on the
 “ lands, the interest, as coming in place of the price, must be
 “ held to be real in their persons, so that Mrs. Scott’s share of
 “ the same does not fall under her husband’s *jus mariti*, therefore
 “ repels the claim of Mr. Crombie and Miss Glendonwyn to
 “ Mrs. Scott’s share of the said interest; sustains the objection
 “ to that part of the report which proposes that one-third part of
 “ the said principal sum of 10,000*l.* be paid to Mr. Crombie, to
 “ be retained by him during Mr. Scott’s life; and finds, that as
 “ this sum must continue in the meantime to be a real burden
 “ on the lands, Mr. Napier and Miss Glendonwyn are entitled
 “ to retain the respective portions allocated to their prices, on
 “ granting heritable bonds in security of the same, the bond by

Oct. 3, 1831.

“ Mr. Napier to be for payment to the children, at the death of
 “ the longest liver of Mr. and Mrs. Scott, of the principal sum
 “ of 6,666*l.* 13*s.* 4*d.*, and for payment, during Mrs. Scott’s life,
 “ of one moiety of the interest to Mr. Crombie, as assignee to
 “ Lady Gordon, and of the other moiety to Mrs. Scott or her
 “ assignees, and, in the event of Mrs. Scott surviving her hus-
 “ band, for payment to her or her assignees of the whole interest
 “ of the said principal sum from the time of Mr. Scott’s death
 “ till the termination of her liferent; and the bond by Miss Glen-
 “ donwyn to be for payment to the children, at the death of the
 “ longest liver of Mr. and Mrs. Scott, of the principal sum of
 “ 3,333*l.* 6*s.* 8*d.*, and for payment of interest only for the time
 “ subsequent to Mr. Scott’s death, which interest, if Mrs. Scott
 “ survive him, shall be payable to her or her assignees so long
 “ as she lives: Reserves consideration of the new claim made by
 “ Mr. Crombie to the interest of the sum falling to Mrs. Scott as
 “ heir-portioner, till the issue of the question betwixt her and
 “ Mr. Napier, as to the validity of his assignation; sustains
 “ Mr. Napier’s objection to the report, in so far as it accumu-
 “ lates the interest arising on the price of the lands of Barqu-
 “ hillanty, with the price itself, so as to form a new capital,
 “ bearing interest from Whitsunday 1820: Finds, that there is
 “ no legal ground for an accumulation at that term, nor at any
 “ other prior to Whitsunday 1828, when the division is cal-
 “ culated to take place; and as the effect of this finding seems
 “ likely to affect the division, remits to Mr. Charles Ferrier, to
 “ rectify the report, in so far as may be necessary in consistence
 “ with this interlocutor. Note.—The Lord Ordinary has re-
 “ served consideration of the claim of the interest of Mrs. Scott’s
 “ share as heir-portioner, because it appears to him, that unless
 “ she shall succeed in reducing her assignation to Mr. Napier,
 “ he, as having right to the principal sum under this assignation,
 “ will have right also to the interest, so that the latter will not
 “ fall under Mr. Scott’s *jus mariti*, the sole foundation of
 “ Mr. Crombie’s claim to it.”

Miss Glendonwyn and Crombie reclaimed, and prayed that
 the whole interest of the 10,000*l.* might be assigned to them.
 Lady Gordon separately prayed to the same effect. Mrs. Scott
 also resumed her objections, and the common agent insisted that
 the interest on the price of the lands purchased by Napier

Oct. 3, 1831.

ought to be accumulated at Whitsunday 1820. The Court, on the common agent's note (1st December 1829) altered "the Lord Ordinary's interlocutor reclaimed against, and find Mr. Napier liable in accumulation from Whitsunday 1821, being the first term after the date of citation in the process of multiplepointing, and adhere quoad ultra;"* on Mrs. Scott's note, "adhered to the Lord Ordinary's interlocutor; but reserving the objections by Mrs. Scott relative to the annuity claimed by her, as payable during her father's lifetime; also of the annuity of 200*l.* claimed by her from and after the death of her father, and to the sum of 4,000*l.* mentioned in her objections;" and on the notes for Crombie and Miss Glendonwyn, and Lady Gordon, appointed minutes of debate, "and thereafter the Court, (21st January 1830) recalled that part of the Lord Ordinary's interlocutor complained of, and find that Mr. Crombie and Miss Glendonwyn are entitled to the whole interest of the sum of 10,000*l.* sterling, which has accrued, or may accrue, during the life of Mr. William Scott; and that neither Mrs. Scott, nor her disponee Mr. Napier, are entitled, during the life of the said William Scott, to draw any part thereof, until the debts of the petitioner are paid: Find Mr. Napier liable in the expense attending this part of the discussion, and appoint an account thereof to be given in, and remit to the auditor, &c." The Court also "refused Lady Gordon's note, in so far as it prays to sustain the objections stated in her name, against Alexander Crombie uplifting the fund set apart to him as trustee.†"

Mrs. Scott and Napier appealed.

Mrs. Scott and Napier as to her right to interest.—The interlocutor finding that Crombie and Miss Glendonwyn are entitled to the whole interest of the 10,000*l.* during the life of Scott, and that Mrs. Scott, and Napier as her disponee, are not entitled to draw or retain any part thereof, is irreconcilable to legal principle, and proceeds on a misapprehension of the facts. Glendonwyn's three daughters had right, in equal portions, to the real burden of 60,500*l.* constituted over the estate of Parton by original minute of sale and by the disposition from Lady

* 8 Shaw and Dunlop, p. 149.

† 8 Shaw and Dunlop, 357.

Oct. 3, 1831. Gordon and her sisters in favour of Scott, and his seisin thereon; but they were liable for equal portions of the 10,000*l*. On the supposition that the interest of the 10,000*l*. can be applied in compensation and satisfaction of the non-payment of the price, Mrs. Scott is entitled to the same right as her sisters, and therefore to participate with them in this benefit.

Answered.—Scott could claim nothing from the prices, or interests of prices, obtained for the estate of Parton, as long as any part of the price originally agreed to be paid by himself was due to any of the co-heiresses of Glendonwyn, seeing that the whole of these prices, and the interests, except in so far as otherwise specially appropriated by Glendonwyn by the minute of sale, were immediately and primarily answerable for payment of the price agreed to be paid by Scott. Under the provision in the minute of sale, the whole interest of the 10,000*l*. belonged originally to Scott, either directly or jure mariti; and the third share of that interest, or the right to it, falling to Mrs. Scott as one of the co-heiresses, could not be claimed by her from her husband Scott, seeing that any claim she might have to it fell under his jus mariti, so that it either reverted to him, or continued with him in virtue of his original right under the minute of sale;—and this third of the interest thus belonging to him he was the creditor in, and the only party who could claim it as against the respondents, while the respondents were entitled to retain it as against him, out of the prices in medio, till their shares of the price due by Scott were fully paid up to them. Napier's assignation from Mrs. Scott could convey no right to the third of the interest of the 10,000*l*. or any portion of it, seeing that Mrs. Scott had no right to it in any view which did not instantly pass to her husband, or which she could enforce against her husband, and none therefore which she could effectually assign to a third party; and the assignation from Scott was equally unavailable as against the respondents, seeing that he had no claim to assign to the appellant, as long as any portion of the respondents' portion of the price due by him remained unpaid up; and the appellant, as his assignee, can claim nothing which it was not competent to Scott himself to claim.

Napier as to accumulation of interest.—There is no principle of law or equity which could entitle the Court to accumulate the interest of the price of Barwhillanty, and convert the same into

a capital sum bearing interest from Whitsunday 1820 to 1821. Oct. 3, 1831.

The appellant purchased the lands of Barwhillanty at a price which was to be fixed by arbiters; and till the price was fixed the appellant had it not in his power to pay it. In consequence of the bankruptcy of Scott, and the failure of the arbiters to fix the price, the appellant was compelled to bring an action for the purpose of having the price ascertained by skilful persons appointed by the Court; but when he had thus at last succeeded in getting the price fixed, there was no person in titulo to receive it. The price was to be appropriated to such of the debts due by Scott as the Court might determine; but, till such determination, the appellant was obliged to keep it in his hands. All this, from first to last, was a severe hardship imposed on the appellant. The current rate of interest has, in general, since he made the purchase, not exceeded four per cent., even when money is placed on permanent securities; but banks in general, and even private bankers, have seldom allowed more than two and a half per cent. on monies deposited with them.

Answered.—By the minute of sale entered into between Napier and Scott he was bound to pay interest on the price of the lands of Barwhillanty from the term of Whitsunday 1813, and half-yearly thereafter, at the terms of Martinmas and Whitsunday, till he made payment of the price itself; but, not having paid any of the interest, he was not entitled to retain both the principal and interest, and make profit thereof at the expense of the creditors of the common debtor Scott.

LORD CHANCELLOR.—My Lords, the judgment complained of seems to me well founded, but there is one point that deserves to be considered, namely, the only point substantially relating to the compound interest. I must take it that the decision of the case of *Jolly v. M'Neill* is not to be held affected by the reversal of the decision of *M'Neill v. M'Neill*—I must take it that it only goes to show the jurisdiction of the Court of Session to allow interest from and after the date of the citation in the process of multiplepoinding. But I wish to have time to consider how far that decision in *M'Neill v. M'Neill* can be taken to throw any light upon the Scotch law upon the subject. I happen to know that the late Chief Baron (*Alexander*) who heard the case here, and mentioned it to me afterwards, took very great pains with it, and I believe had some communication with the Scotch Judges upon the Scotch law of compound interest. I wish to

Oct. 3, 1831. hear what he says upon this matter. I have a strong opinion upon the biennial rests ; but for greater accuracy I wish for a little time to look into it, and consult the late Lord Chief Baron. The only other ground upon which I entertain any doubt is this : Suppose the Lord Chief Baron should inform me that the case of Jolly v. M'Neill rests quite independent of the reversal of M'Neill v. M'Neill—that it proceeded upon the ground of biennial rests—then I shall be of opinion that the Court of Session has done wisely in reversing the interlocutor of the Lord Ordinary, who disallowed the interest, and found that Napier was liable in accumulations from Whitsunday 1821, being the first term after the date of citation in the process of multiplepoinding ; and I should be of opinion to agree with them, were it not for the consideration that struck me while the case was going on, and which the learned Sergeant has alluded to in his reply, though I do not find any reference made to it in the argument in the printed cases ; but I am certain there is no reference made to it in the Judges' notes in the present case, or in the cases of Jolly v. M'Neill or M'Neill v. M'Neill—and that is this, 'Whether a citation in a summons of multiplepoinding is the same, in respect of the law of Scotland, as regards allowing interest after the date of the citation, and the judicial demand it implies ? Whether the law is the same in a demand of this nature, which has been called a case of constructive demand, as in an ordinary case, where there is a debtor on one side and a creditor on the other, a party demanding and a party resisting the demand, and where the party refusing to comply with the demand has a party to pay to, and to whom he may safely pay ? If I pay money to one not entitled to receive it, I pay it in my own wrong, and I am liable to pay it over again. The consequence of which is, that in the law of Scotland, there has arisen a process of multiplepoinding which calls parties to come forward with their claims, and after these have been adjusted, it appears who is in law entitled to receive ; and then the pursuer in that process—the party who wishes to pay, but cannot safely pay—pays to the person indicated as the person to whom he may pay safely ; for he has the best authority—a judicial authority—for paying, and cannot pay in his own wrong. In like manner, in England, a bill of interpleader has been devised to enable a party to pay, who could not otherwise pay, though he admitted the demand. This is a proceeding in equity with us now, but it used to be known in the common law. You may have an interpleader in common law, but that has been superseded by a more convenient practice with us, and it would in Scotland also avoid much of the litigation we have in these cases. The question generally arises in the case of a party holding goods ; a doubt exists who has the right to them ; whether, *e. g.*, the unpaid seller has a right to stop them, or whether the assignee under the buyer's

Oct. 3, 1831.

commission has a right to them; and they take a much shorter and easier course than interpleader or multiplepoinding. One party indemnifies the wharfinger, who has no objection to give them up, and only wishes to be safe in doing so; he gets his indemnity, which puts the party in his shoes. Suppose A. the stake-holder, B. and C. the conflicting parties; A. gives up the stake to B. upon an indemnity, which leaves B. to fight it out with C. An action of trover is brought by C. against A.; then B. defends it, though in the name of A., and without the evicuity of a bill of interpleader or of that obsolete proceeding in a court of law the same result is obtained, and A. has not to pay one farthing, the whole trouble and whole costs falling upon B. and C. How far complaints may lie against that simple remedy among members of the profession I will not say. However, here the question is, Whether the non-payment of a demand, on citation upon a summons of multiplepoinding, is to be taken to be equivalent to non-payment in the case of a legal demand? that would let in the principle recognised rather than laid down in *Jolly v. M'Neill*. It is said, on the other hand, that this is not all, because no person can say there was any laches, any mora. I can see no difference between interest upon interest (if interest is part of the legal demand) and interest upon a sum of money, if that sum of money is a legal demand. I cannot perceive the difference between the liability to pay interest, where A. is indebted to B. for interest upon money due, and the liability to pay interest upon interest, where A. owes B. money plus the interest. You may call it compound interest; it is perfectly immaterial as to the law of Scotland. But the answer made as to the two cases of a summons of multiplepoinding and an ordinary demand, is this; it is true you were not bound to pay upon the citation in the multiplepoinding, because you did not know the parties entitled; but why did you not consign the money? You might have consigned it; and the not consigning, upon being served, is held to be, in this case, equivalent to a refusal to answer the demand in the other case, where there is no conflict of creditors, but one creditor and one debtor, and it is admitted that the Court had the ordinary jurisdiction of charging interest from the time of the citation. I am not quite prepared to say that that is so. I can see some difference between the two cases; but this is not a question raised in the Court below; this view has not been taken on the Bench; and as that is the main ground, supposing the law in *Jolly v. M'Neill* to stand, notwithstanding the reversal of *M'Neill v. M'Neill*,—as, I apprehend, it will be found to stand, the only ground of doubt being one apparently not raised below, and on which the opinions of the Judges give me no light—I should wish to have an opportunity of communicating with them, to ascertain how far it is, according to the law and the practice of

Oct. 3, 1831. Scotland, that non-consignment is held to be the same as non-payment, where there is a possibility of paying safely without the chance of loss. I shall however say no more upon this case, unless it turns out something further arises upon this inquiry, when made, of the Chief Baron and the Judges in Scotland. I shall have stated the grounds of my opinion in affirming the decision of the Court below, if it is affirmed; and I shall also have stated the grounds of the reversal, if it is reversed, and that will dispense with the necessity of my troubling your Lordships again.

The case was thereupon adjourned.

LORD CHANCELLOR.—My Lords, this is a case of very considerable importance in one view of it; namely, that relating to the accumulation of interest, which has been given by the ultimate judgment of the Court—interest upon interest. This arose out of a minute of sale, executed on the 7th of January 1814 by Napier to Scott, and in which Scott stipulated for the payment, and Napier bound himself to pay interest from the Michaelmas preceding, namely, 1813, to be paid every half year, till the term of the payment of the principal, which was a sum of about 10,000*l*. I think he was only to pay the principal money; and interest up to that date was to be accounted from the period of a certain decret-arbitral, affixing the amount of the purchase money, and stating the value of the land. Napier appointed an arbitrator, and so did Scott, but the arbitrator appointed by Scott refused to act, and Scott refused to concur in appointing another, so that the laches in obtaining the award was to be imputed to Scott, and not to Napier; but nothing will turn upon that, proceedings having taken place in the Court of Session to ascertain the value, in consequence of the refusal to appoint an arbitrator, in November 1819. The Court of Session, having taken means to ascertain the value, fixed it at a certain sum, which ought to have been paid after deducting 10,000*l*., the balance due from Scott to Napier; and it was on the balance that the interest was to be paid. This goes only to the amount. A process of implement was raised, and after that an action of multiplepoinding—summoning all the parties having claims, with a view to its being determined what was the balance, and to whom it should be paid. The Lord Ordinary having disallowed the account of Mr. Ferrier the accountant, the Court of Session reversed that interlocutor, and allowed the interest upon interest ever since the date of citation in the multiplepoinding. Ferrier appears to have reported, that the interest should be allowed from Whitsuntide 1820; the Court have decreed that interest should be paid from Whitsuntide 1821. I will state to your Lordships what I take to be the reason of the report of Ferrier, referring to Whitsun-

Oct. 3, 1831.

Whitsuntide 1820, which was before the citation in the action of multiplepoinding. Mr. Ferrier (and I think with a colour of reasoning in the Scotch law; but that is not now before us, as the party appears to have acquiesced in the ultimate decree, allowing it only from the decree,) gave the interest from Whitsuntide 1820, upon this ground, that Napier had agreed to pay Scott interest every half year, from Michaelmas 1813 to the date of payment. Now, the date of payment was to be upon the award. When was the award? There was no award; but in the place of an award is to be substituted the proceedings in the Court, and the final judgment in that proceeding, which was the 12th of November, the first day of the winter session in 1819. Now, the accountant says, that as he ought to have paid the principal fund upon that day, so ought he upon that day to have paid up the arrears of the interest—but he did not; and therefore he accumulates them in the meantime, and makes him pay interest from Whitsuntide 1820: That is the colour of reason which appears to have been for his report. My opinion is, that the Court have come to a sounder conclusion, in point of law, in not allowing that interest from Whitsuntide 1820, but from Whitsuntide 1821; because in order that you may be entitled to accumulate interest upon interest, you must have something more than the arrival of the day of payment, where there is no express stipulation reserving rests, or accumulation of interest—and even rests are subject to much consideration; because, as they tend greatly towards usury, our Courts of equity discountenance them as cloaks and shifts for usury, and so does the Court of Session, which is a court of equity as well as of law. I therefore think the interlocutor is right in preferring the period of Whitsuntide 1821 to the period of Mr. Ferrier's report, of Whitsuntide 1820. I have also to add, that the ground of this last period being taken is that the summons of multiplepoinding was signeted on the 26th of February 1821; consequently they could not give interest until the Whitsunday immediately following (Martinmas and Whitsunday being the accustomed terms). They would take the interest only from the term next succeeding to the summons; which is to say, the Court held that citation in the multiplepoinding to put the party not paying in mora, and therefore they give accumulation upon the sum—they give the interest not as compound interest; and that is the fallacy of the argument of the appellants in this case, when they say that this is contrary to law; as if it were interest upon interest, annual rent upon annual rent. It is not so: the claim of the party is for two sums—the principal which was due, and the interest due from the date of the decreet-arbitral, or, in place of the decreet-arbitral, the judgment of the Court on the first day of winter Session 1819,—from the time the

Oct. 3, 1831. interest became the subject matter of the suit. It is just as much liable to interest from that day, up to the time of payment, as the principal. The party refusing payment on the citation has put himself in mora, and is just as much liable to pay interest upon that as upon the principal, or any other debt which one man owes another. In England the case is perfectly different; but then, in England, it is not different in respect to interest and principal; for if, instead of saying a word about interest, an action had been brought, it would not have made the slightest difference whether it was interest upon principal, or upon interest. In neither case would interest have been allowed. A stronger instance cannot be taken than an action upon a bill of exchange;—you can get no interest on interest there, but you get interest on the bill up to the fourth day of next term. If I have a demand for 1,000*l.*, not upon bill or note, and bring an action for it, by which I make a judicial demand of the principal, I do not recover interest upon that. By the English law, you cannot recover interest either before the commencement of the suit, or from the commencement of it, either on principal or interest; but in Scotland it is not because it is interest, but because it is the subject matter of the action, that the Scotch law gives interest, contrary to the principle of the English law, from the instant that the party being called upon to pay, and who ought to pay on the citation, refuses to pay, and thereby becomes, under the Scotch law, in mora. But now with respect to the particular form of the action. I entertained, as your Lordships may remember, some doubt whether the case of multiplepoinding was not different from an ordinary action; for in an ordinary action, you are in mora if you do not pay, because you know to whom you are to pay; but not so with respect to an action of multiplepoinding. The answer to this appears to be what I flung out at the time, and on which I have since had communication with learned persons on the bench in Scotland. It is clearly just as good in an action of multiplepoinding as in an action of another nature; upon this no doubt exists. An action of multiplepoinding puts the party who does not pay in mora, as much as in any common action; because he has only to consign. There is a provision, as I observe, in the 53d of George III. to which I am referred by one of the printed cases; the party is safe on consigning into Court, and from that time he is chargeable with no interest; but if he chooses to keep the money mixed up with his own funds, it is in vain for him to say that he ought not to pay five per cent., because he may not have got above two or three, or nothing at all. He is in mora; there is a wilful neglect of duty on his part; and therefore he shall pay interest. Upon these grounds, I humbly submit to your Lordships, that the judgment of the Court below, which is the subject of appeal, ought to be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed. Oct. 3, 1831

Napier's Authorities.—Campbell, March 3, 1802 (F. C.); M'Neill v. M'Neill, May 26, 1826 (4 S. & D., No. 386); 22 Dec. 1830, (4 W. & S. p. 455); Jolly v. M'Neill, May 28, 1829 (7 S. & D. p. 666).

Common Agent's Authorities.—Queensberry's Executors, 21 Dec. 1826 (5 S. & D. No. 112).

DUTHIE, MACDOUGALL, and BAINBRIGGE—MONCRIEFF,
WEBSTER, and THOMSON,—Solicitors.

BARRON GRAHAME, Appellant.—*Sir C. Wetherell—A. M'Neil.* No. 58.

SARAH GRAHAME and others, Respondents.—*Dr. Lushington.*

Entail—Sale.—Sale of lands by public roup sustained (affirming the judgment of the Court of Session), which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation and infestment, engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the Register of Entails till after the sale. *Appeal.*—Order on an agent to exhibit the authority for putting the name of a counsel to an appeal case which was disclaimed by the counsel, and observations on alleged practice of doing so without authority.

BARRON GRAHAME, as one of the heirs-substitutes under a strict entail of the lands of Balmakewan and others, contained in an antenuptial contract which had been entered into in 1748 between William Grahame of Morphie and Katherine Ogilvy, brought a reduction of the sale of a portion of these lands which Robert, eldest son of William, had made in 1786 in contravention of the entail. The pursuer was descended of William Grahame by a subsequent marriage with Wilhelmina Barclay of Almeriecross. His action was directed against Sarah Grahame the only surviving child of the contravener, Robert Grahame, and against Shand and other parties, into whose hands the purchased lands had come. At the date of the action only two days were wanting to complete forty years from the date of the sale. Oct. 6, 1831.
1st Division.
Ld. Fullerton.

The defenders stated that the purchase of the lands had been

Oct 6, 1831. made for a fair price by a Dr. Gillies at a public roup; that the disposition in favour of the purchaser was dated the 6th and 7th of February 1788, under which he was infest on the 6th of March, and infestment recorded on the 22d of April of the same year; and that he afterwards obtained a charter of confirmation under the Great Seal, which was dated the 27th of December 1791, and sealed the 3d of January 1792; whereas the entail founded on by the pursuer was not recorded in the Register of Tailzies until the 21st of November 1792. The defenders therefore pleaded, that a bonâ fide and fair purchase by a third party at a public roup, followed by infestment, could not be reduced, though the seller might be acting in contravention of an unrecorded entail.

The pursuer answered, that the contravener had made up his title to the lands under the entail; and that his recorded infestment at the date of the sale bore within it the whole fetters of the entail, so as thereby to certify the purchaser of the limited title of his author. He further stated that the deed of entail had been recorded for preservation in the books of Council and Session prior to the date of the sale.

The Lord Ordinary assoilzied from the reduction with expenses, and the Court unanimously, without requiring any argument from the respondents' counsel, "Found, that, as the
 " pursuer is a substitute heir of entail under the deed of entail
 " founded on, he is entitled to pursue this action; but, in respect
 " the said deed of entail was not recorded in the Register of
 " Entails till after the date of the sale libelled, refused this note,
 " and adhere to the interlocutor complained of."*

Grahame appealed.

When the case was called, and Dr. Lushington appeared for the respondents, the *Lord Chancellor* asked,—How does it happen, Dr. Lushington, that your signature is affixed to the case for the appellant, and that you now appear for the respondents?

Dr. Lushington.—I do not know, my Lord; I believe there must have been some mistake about the retainer.

Lord Chancellor.—I will read the standing orders of this House on this subject, of the date of the 19th of April 1698; the first is in these

* S. D. B. p. 231.

Oct. 6, 1831.

terms :—“ The House taking notice, that, upon appeals and writs of error, there have been of late several scandalous and frivolous printed cases delivered to Lords of this House ; for preventing whereof for the future, it is this day ordered that no person what-ever do presume to deliver any printed case or cases to any Lord of this House, unless such case or cases shall be signed by one or more of the counsel who attended at the hearing of this cause in the courts below, or shall be of counsel at the hearing in this House.” And further, “ Whereas, by the rules and orders of this House, for preventing the bringing of frivolous appeals, all appeals are to be signed by two counsel, it is this day ordered, that no person whatsoever do presume, as counsel, to sign any appeal to be brought into this House for the future, unless such person hath been of counsel in the same cause in the courts below, or shall attend as counsel at the bar of this House when the said appeal shall come in to be heard ; and unless he shall certify that in his judgment there is reasonable cause of appeal.” Lord Eldon used to inquire who had signed the petition of appeal, and who were the counsel ? and it appears necessary to do it again. These standing orders are for the security of the House, and they are a security against frivolous appeals. Dr. Lushington, did you sign your name to this case ?

Dr. Lushington.—No, my Lord.

Lord Chancellor.—Did any one take the liberty of signing it for you ?

Dr. Lushington.—Not that I am aware of, my Lord ; no one had any authority for doing so.

Lord Chancellor.—Mr. Poole (solicitor for the appellant), did you get Dr. Lushington’s name signed to the appellant’s case.

Mr. Poole.—No, my Lord.

Lord Chancellor.—Where was it drawn ?

Mr. Poole.—The case was drawn, settled, and printed in Edinburgh, my Lord. I know nothing further about it.

Lord Chancellor.—Who did it ?

Mr. Poole.—Mr. John James Fraser, my Lord.

Lord Chancellor.—I shall move the House to make an order, calling on Mr. Fraser to send to this House the original signature of Dr. Lushington to this case ; for I know that the client will be charged five guineas for that signature of Dr. Lushington, and five shillings for the clerk. There is another thing for which the client pays—(his Lordship standing up and unrolling a very lengthy petition of appeal).—This is the petition of appeal in a case that lies in a word. Here (holding up a small piece of parchment) is the petition of appeal in the last case, a case which does not lie in a word. That is properly drawn ; but the present petition of appeal embodies the whole record.

Oct. 6, 1831. That is not done without great expense to the parties. I have looked at this case, and a more frivolous appeal I never saw. The case is about the plainest and the clearest on the face of it, and on the shewing of the appellant, that ever I have read since I have been in practice in courts of law. I have no objection to hear whatever counsel do not think it unreasonable to argue; but if this unanimous judgment of the Court below be affirmed, I shall move the House to visit real and actual costs upon the party appealing; and I shall take into consideration, when I hear the return to the order of the House respecting Dr. Lushington's name being added to the case, upon whose pocket the payment of those costs should fall. Having said so much, I would recommend the parties to investigate the case a little farther, and if they think it desperate not to come here again. This Court must be protected, like all other courts. I therefore move your Lordships, that John James Fraser either do attend at your Lordships' bar personally, or do forthwith transmit to your Lordships' clerk the authority which he had for signing Dr. Lushington's name to this appeal.

Ordered accordingly.

LORD CHANCELLOR.—My Lords, this case is one in which there has been a breach of the privileges of this House committed—a very grave offence—in respect of a false signature laid on your Lordships' table. On the merits this case is the most groundless I ever saw brought before this House, and equally objectionable in point of form, the petition of appeal being drawn out with the most unwarranted prolixity, and not the least like an appeal petition, but like a very long appeal case, all on parchment, and all utterly useless, to the great expense of the parties, as I see by looking into the attorney's bill of costs. That being the case, I asked Dr. Lushington, whose name I saw to the appellant's case, I asked him whether he had not signed and certified it—your Lordships' rules requiring that. He said, he not only had not signed and certified the case for the appellant, but that he was retained as counsel on the opposite side. It then became important that we should be informed who had put Dr. Lushington's name to this case, without the colour of authority from him for doing so. I therefore moved your Lordships, that the agent for the appellant should be called to the bar; or, to spare him a journey of 400 miles and back, that he should give an account, explaining minutely the reasons of his conduct. My Lords, I have now obtained that explanation in great detail, and made with very great zeal and anxiety on the part of this gentleman, and some other gen-

Oct. 6, 1831.

tllemen to whom he appears to have applied, and who appear to have backed him upon the occasion ; and I take the result of the statement to be this :—First, that Mr. Poole, the agent in London, is guilty of not even the shadow of disrespect towards this House, or a neglect of its rules and forms—that he has no part whatever in this matter. It appears further, from the certificates which have been sent up, that a practice has crept in among professional men at Edinburgh to sign the names of English counsel who never were at Edinburgh, and who probably may never be there, without any communication with them, and without ever notifying to them the liberty taken of signing their names to whatever is chosen to be put into an appeal case, and it appears that quite enough is thought to be done if afterwards retainers are sent in the cause. My Lords, I have been for more than a quarter of a century a professional man, and this is the first time I ever heard of such a practice. I should have thought myself very ill treated as a barrister, if I had been so used, by having my name signed to a paper without my having seen it ; for though it is quite true that the men in leading practice do sometimes put their names to papers without reading them, they always do it in full confidence and reliance on the gentlemen whose names they see beside their own, because they judge that those gentlemen are not putting their names to any thing that will discredit them, or be disrespectful to your Lordships ; but this, I am told, is the practice at Edinburgh. My Lords, I do not believe it is a general practice at Edinburgh ; if it were, it ought not to continue for an instant. I cannot believe that the respectable men of business at Edinburgh, either the advocates or the writers, can continue to sanction a practice so extremely irregular, so full of evil—opening the door to such frauds on the counsel, on the Court, and on the parties. But, my Lords, I have seen the certificate of counsel to this practice, and I have read the certificate of two advocates, whom I know to be respectable and able, having heard them argue cases here, that they have themselves put the names of English counsel to cases, and directed them to be put, and that it was a sort of retainer, for that it was an indication to the solicitor that he was to go and retain those counsel. My Lords, it must henceforth be understood by all counsel as well as by solicitors, that a counsel ought not to interfere in attempting to retain another counsel in any way, directly or indirectly. If an English counsel were to interfere by giving a hint who should be employed with him, or who should be employed in a cause whereupon he had been consulted, he would be considered as acting unprofessionally. My Lords, I hold it to be a practice in its nature liable to every species of abuse, and therefore I rejoice that I speak in the presence of most respectable professional men, who will let it be understood, that no English barrister ever recommends another barrister

Oct. 6, 1831. to be employed. I also say it is wrong in Scotland, and if it be the practice there, it ought to be put a stop to; and I have no doubt that the faculty of advocates, (a body I highly respect, in which I was bred, and to be a member of which I regard as one of the greatest honours of my life,) unless this practice is given up, will look into it, and express their displeasure. My Lords, in the last case in which a person was found to have put the name of a counsel to a paper without his authority, he was ordered to the bar, and was committed for the contempt. In the present case, I am satisfied with the explanation which has been given by the Scotch solicitor. I have looked narrowly into his bill of costs, and I find—which goes a great way in forming my opinion of the course I ought to recommend to your Lordships—there is complete and satisfactory evidence that he never charged the fee for putting Dr. Lushington's name in his account with his client; and upon that ground, and because the practice has prevailed to a certain extent at the Scotch bar, though I am quite confident it is not general, and I hope it will now cease altogether, I shall move your Lordships, that the order for the attendance of Mr. Fraser be discharged, and no further proceedings be had regarding him; and with respect to the appeal, that if it is intended to be persevered in, the counsel for the appellant may be called in and heard to-morrow morning.

Ordered accordingly.

LORD CHANCELLOR.—My Lords, this case has been put on the only ground on which it was possible for it to stand. After the uniform current of authorities on this branch of the Scotch law (I think more uniform than on any other) it was impossible to rest it on any other ground. The case is shortly this:—A person entailed, for a valuable consideration, (the highest known in the law, namely, that of marriage,) an estate upon the issue of that marriage, with certain destinations, fencing his prohibitions with irritant and resolute clauses. We will take it that the instrument itself is valid and complete in all its parts, but when Dr. Gillies purchased the estate in 1788, one thing was wanting to give that entail effect, in questions with singular successors, (as purchasers or incumbrancers are called in Scotland,) and that is, the recording of the entail. It was recorded in the register of sasines, and Dr. Gillies may be said to have received notice from seeing the title he took; so that he had not only notice de facto, from seeing these clauses in the progress of the title, but he had also notice de jure, from the record in the register of sasines; but it was not recorded in the register of tailzies. It is not pretended that there was any fraud or irregularity to which he was a party; but

Oct. 6, 1831.

he bonâ fide purchases the estate, (the estate being sold against the prohibition of the entail,) a disposition is regularly taken, and an infestment follows thereupon, which is regularly recorded. In 1792 the entail itself was recorded in the register of tailzies. Forty years all but two days elapsed after that sale so made, and then it is said, an invalidity had occurred, and that the right purchased or sought to be purchased cannot pass, though the sale was four years prior to the registration in the registry of tailzies. It is perfectly clear this would have been a case of most grievous hardship, if the Court of Session had found themselves compelled to set the sale aside, and take away the estate from a bonâ fide purchaser for valuable consideration, to give it back to the children of the person who had sold it to a purchaser also for valuable consideration. Two days more would have given the purchaser a title by prescription, for he had certainly a title to prescribe upon. Nevertheless the two days had not elapsed, and it was within the forty years, and two questions are accordingly raised; the first, whether or not, in this particular case, the recording the entail in the register of sasines is sufficient as against purchasers, namely, those representing or taking under Dr. Gillies?—the second, whether there is any thing in the peculiar nature of the consideration upon which this entail was executed, namely, marriage, to differ this from the common case, in which the estate would beyond all doubt have passed? Now, my Lords, I have the clearest opinion, that neither of these circumstances signify at all in the case, and that if your Lordships here were to reverse, or the Court of Session below had decided otherwise, the whole law of entail in Scotland would be upset. I need hardly remind your Lordships of the Stormonth case, or call back to your recollections what was the state of the law before the great entail act of 1685, which is the rule in this case, and which has often been made the subject of discussion at that bar. It may be a matter of curious antiquarian discussion, how far, prior to the passing of that statute, entails were valid against singular successors. It may be that one opinion of Lord Braxfield, who held that there were entails before the statute, is correct; it may be that another opinion of Lord Braxfield to the contrary is correct. It may be that Lord Meadowbank's opinion, which has been pronounced in the strongest possible language, in support of that doctrine of the non-existence of entails prior to the statute, is sound. This, as it regards practical purposes, has become of little consequence, because all the decisions, without any exception, make it perfectly clear, that since the statute, whatever the law might have been before, an entail is only good which is made according to its provisions; and that the statute, in so far, may be said to be a restraining rather than an enabling act; for that unless persons comply with the statutory requisitions, their entail is not worth the paper it is

Oct. 6, 1831.

written on. My Lords, when I speak of the Stormonth case, and its being a curious matter of discussion, rather than for any practical purpose, I do not overlook the view based on the prior, and, as it may be called, common law validity of such instruments, and the arguments which may thence be raised fruitfully, for the purpose of founding a principle important in a case similar to the present; for instance, having reference to the very valuable argument of Lord Eldon in the Sheuchan case, Sir Charles Wetherell contends that, independent of the statute, there has been a valid and a binding contract. A. contracts with B., that, in consideration of a marriage to be consummated between them, he will entail a certain estate on the heirs of the marriage; the marriage is contracted; the contract, therefore, is executed on the one side, must he not execute it on the other, and this, independently of the statute? If he does execute the contract by doing that which is contracted for in respect of the marriage, that becomes a valid entail; and if he sufficiently fences that entail with clauses, and records it in the register of sasines, that is sufficient; if he has, in consideration of marriage, executed a deed of tailzie, that ties up his hands for the future, whether with notice or not; and whatever the effect of notice in equity, at law the title is gone. Suppose you made a settlement of estates on the first and other sons of a marriage, and then I choose to sell those estates for a valuable consideration to a purchaser without notice, that purchaser may be put out of possession by an ejectment, in which your eldest son is lessor of the plaintiff, if he brings that ejectment within twenty years after your decease; of that there is not the least doubt, and even though the purchaser had no notice whatever, (I am putting the case of an estate in Lancashire, or in any country where registration does not prevail,) that purchaser has no title to the estate, whether he knew any thing about the settlement or not. If the case be as to an entail antecedent to the act of 1685, which of course puts registration out of the case, that is precisely the footing on which the Scotch heir of entail and Scotch purchaser would have stood. Then the argument must go this length, that without any sasine, without any registration, and even if the entail did not appear upon the title, and Dr. Gillies knew nothing about it, he would have had no title; because there had, behind his back, been executed a valid entail in consideration of a marriage. That is the argument. Now, all I have to say about that argument is, that would be perfectly sound law in England. It is equally clear that there is no such law in Scotland, and that such a private entail would not have been valid there. The Stormonth case is strong to show that before 1685 entails were supported, and at all events such was the usage for many years. The Stormonth case was in 1662, and the entail act in 1685. During

Oct. 6, 1831.

those twenty-three years many entails had been framed, which were understood, on the authority of that case, to be valid against singular successors. But the act has been held to make all those entails invalid, unless they were registered. The words of the statute are most precise. It first says, that any of the King's liege subjects may tailzie their estates, and affect them with clauses, and so forth. Then what follows is declaratory,—“it is always declared.” I shall assume, which is putting the case as favourably for the appellant's arguments as I can, that it is a mere declaratory act up to a certain point, and that whatever is allowed to be done is by way of declaration, and not enactment; because this will assume that before the act an entail would have been valid according to the Stormonth case. Then, what follows—and there is no doubt this is enacting and not declaratory—what follows is purely the creature of the statute, for there was no such thing in existence either in law or in fact, prior to the date of this act:—“It is always declared, that such tailzies shall only be allowed, in which the foresaid irritant and resolute clauses are insert
 “in the procuratories of resignation, charters, precepts, and instru-
 “ments of sasine, and the original tailzies once produced before the
 “Lords of Session judicially, who are hereby ordained to interpose
 “their authority thereto,”—a process totally unknown before, and which is the creature of this statute; “and that a record be made in
 “a particular register-book to be kept for that effect, wherein shall be
 “recorded the names of the maker of the tailzie, and of the heirs of
 “tailzie,” and so forth, “to remain in the said register ad perpetuam
 “rei memoriam.” Here, therefore, is a peculiar register created; here is the invention of a peculiar process, namely, production before the Lords of Session of the original tailzie; and here is a positive requisition of the statute, that in order to make the aforesaid tailzies by the statute valid, there must be the condition precedent, of producing them before the Court of Session, and recording them there. Now, of that there can be no doubt; but if there were any doubt, what follows will take it away. It might be said, that as to that requisite, it was directory, and was not a condition precedent; still it must be observed, that producing the entail before the Court of Session has not been done in this case. But it is not merely directory, it is a condition precedent; what follows removes all doubt as to the registration in the register of tailzies, now for the first time constituted; for this rides over the whole antecedent,—“and being so insert”—that is, in the register—“his Majesty, with advice and consent foresaid, declares the
 “same to be real and effectual, not only against the contraveners and
 “their heirs, but also against their creditors, comprisers, adjudgers,
 “and other singular successors whatsoever, whether by legal or conven-
 “tional titles.” I need not go farther to show that, whatever may

Oct. 6, 1831. have been the law before this statute, we are now governed by a statute which enacts, that whatever may have been originally the validity of the entail against singular successors from the time of the Stormonth case downwards, henceforth it should be good against them, only if the statutory requisite was strictly complied with. Now, my Lords, if any doubt could have arisen here, it was only this, how far entails made before the statute was passed should be shaped according to the terms of the enactment which I have just read, and cast, as it were, into the mould of the statute. It might be said that the statute makes provision as far as regards entails to be made hereafter, (the words being all in the future tense,) but what shall be done with the entails which had been made after the Stormonth case, and before the statute, on which money might have been advanced, and marriages contracted? That was a very maintainable argument, and it is only to get rid of it that you have recourse to the decisions in the Scotch courts. The statute appears to me sufficient without the decisions. Nothing can speak clearer than it does, and the record of an act of parliament is better than any decision. But, my Lords, when we look to the books to see whether they throw any light on this point, we find in all those cases, from that of Philip v. the Earl of Rothes, in December 1758, which was the first that affixed this construction to the act,—we find it adjudged, that though an entail be made prior to the statute, and in that case the entail was between the Stormonth case and the statute, namely in 1684, yet, that subsequently to the statute it must be dealt with as a statutory entail, and that there is no difference whatever in this respect between an entail made before the statute and one made since. The cases have adopted also another principle; they have said, that no recording in the register of sasines will do; for the statute assuming as a matter of course the recording in the register of sasines, requires expressly that every thing should be recorded in the register of tailzies. It is no doubt also requisite that you record your sasine; unless you do so you have no right, and a purchaser or creditor may come in totally independent of the entail. But, in order to make the fetters of the entail binding, so as to constitute a nullity against singular successors, who may have advanced money on the faith of this property, it is necessary also, by the words of the act, that it should be registered in the register of tailzies, and that the process should be first gone through of producing the original tailzie at that time, and before the Lords of Session, for the purpose of their recording. Accordingly, your Lordships will find that in all the cases this registration has been held necessary. In the case of Baird v. the Earl of Rosebery in 1765, infestment had been taken and entered in the register of sasines. Being thus recorded in the public registry of sasines, and open to all the lieges, say they in the argument, therefore you had notice. But the

Oct. 6, 1831.

Court says that will not do, for it was not recorded agreeably to the statute, unless it was registered in the register of tailzies. In the cases of Lord Kinnaird v. Hunter, and Irvine of Drum against the Earl of Aberdeen, and Smollet v. the Creditors of Smollet, there had been a recording in the register of sasines four years before; but as it could not be shown that until four years after that time the entail had been recorded in the proper register of tailzies, it was held not to be good. When indeed the statute had required a recording in the register of tailzies, and that this should be a *sine quâ non* to its validity against purchasers, that was enough, without any reasons or any decisions. But the reason plainly is, that when people want to know if the estate is entailed, and if it is safe to advance money by way of loan or purchase, they go not to the register of sasines, but to the register of tailzies. Accordingly the statute, instead of being a protection to all mankind, would be a trap to ensnare all mankind, if, while it required a record of the entail in the register of tailzies, the Court had said, you need not record it in the register of tailzies, it is sufficient if you do it in the register of sasines. Dr. Gillies might say, I have advanced money for the purchase of this estate, for I looked into the register of tailzies, and there it was not. But, says the argument for the appellants, why did you not look into the register of sasines? It is sufficient for Dr. Gillies to reply, the statute pointed me to the register of tailzies; let the register of sasines speak what it may, I am not bound to hear one word; here is the statute, and if it is not recorded in the register of tailzies, I need look to no other. Now, my Lords, with respect to the marriage consideration, I can only say that the statute is silent on any such exception—the text writers are silent—all the cases are silent. I have referred to them; and as reports do not make particular mention of the consideration of the entail, I sent for the original cases, and I find on examination that they are not apparently cases where the consideration was marriage; but the very silence of the reporters in all those cases (in most of which they do not say what the consideration was) is a decisive proof of the sense of the profession that it is quite immaterial what the consideration was. In many of these cases it is assumed that there may be some consideration. Look at the Sheuchan case: Lord Eldon there said, this is an onerous transaction for a valuable consideration, not a mere mutual entail, but proceeding likewise on money consideration; and if the tailzie is registered, that is to say, in the register of tailzies, it shall affect singular successors. Indeed Sir Charles Wetherell candidly admitted that it was rather for the tenor of the remarks, and the learning of the argument of the noble and learned Lord, than the bearing of it the decision, that he cited it. My Lords, I have examined the case to see what difference it makes to the argument; whether

Oct. 6, 1831. marriage is the consideration, or any thing else. The whole law of registration proceeds upon the supposition, that a consideration may be executed on both sides; that is to say, that a man may give his money, and yet lose it, may purchase an estate, or may lend money on an estate, and may yet be found to have thrown away the money, and the person who after him purchases, or after him lends, may get the estate. The whole law of registration proceeds upon that assumption. The case Sir Charles Wetherell put, and which he said they could not deny on the other side, was, that if, during the interval between the time of executing the entail and the period when it was necessary, by the formalities, to have it registered, the party making the entail had sold the estate, he would have defeated the heirs of entail under the onerous consideration of the marriage. There is no doubt about that. The other party must admit it is the consequence of the argument, but it is no *reductio ad absurdum* of their doctrine; for the law of registration says, that the validity of the title is to be taken from the date, not of the constitution of the title, but of the registration of the instrument in the register of tailzies. It is just so if you lend money on heritable bond, and another person afterwards lends his money and registers his bond before yours; if there is a fault at all, it is not in the argument, but in the system of registration. My Lords, upon these grounds I entertain no doubt on either of the two points, that is to say, either as to the registration requisite being a registration in the register of tailzies, or as to the specialty of marriage said to exist in the case, and which does not in the least shake the decision of the Court below. My Lords, if I had entertained any doubt, I would have called for the assistance of the learned counsel for the respondent, who were ready to argue the case; but I felt none. Only consider what the consequence would be if we were to import an exception into an act of parliament where none such exists; to import a new limitation into the doctrine of the cases, where no such limitation exists. With what view are entails made? Almost always upon marriage; ninety-nine entails out of a hundred are in the contemplation of marriage. See what would be the consequence if they were to be exempted from the requisitions of the statute. They would be valid to defeat the rights of singular successors, although no singular successor has any means of discovering whether the entail exists or not. The register of entails is the place where the act bids him look. But the appellant would have us say, You need not go there, for it needs not be registered there; it is a good and valid instrument, because it is made on consideration of marriage.

My Lords, I conceive this case ought never to have come here. For the ingenious argument at the bar I observe that Sir Charles Wetherell is the person to whom the parties are indebted. I have looked

in vain into the papers in the Court below for it. He has put the case here on the only ground on which it was possible to put it, but I cannot trace a vestige of it there. The pleas in law do not raise that question; they proceed upon an argument, which, if it prevailed, would destroy the whole law of entail; but they do not say that this is a peculiar case; they do not say, when the cases are quoted on the other side, these are no cases of marriage settlement. This is not the argument relied on in the Court below nor in the appeal case; and as it is only from the respect I bear to the quarter from which this argument proceeds that I have stated the view I take of the case, I shall therefore certainly deem it my duty to recommend to your Lordships to visit the party appealing with costs. These he well deserves to pay, because it turns out that he is not brought here by bad advice, but chose to think that he saw a way of proceeding for reversing the judgment; and it appears from Mr. Fraser's statement that he gave instructions for this appeal. My Lords, I wish to give the real costs. I shall therefore follow the example of my learned predecessor, and suspend the mention of the sum of costs until Mr. Courteney shall have had an opportunity of ascertaining what they amount to.

Oct. 6, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of, be affirmed, with costs, as reported by the clerk.

GEO. W. POOLE—A. M. MACRAE,—Solicitors.

Sir JAMES MONTGOMERIE and others, Executors of William Duke of Queensberry, Appellants. No. 59.

MACKILL MAXWELL, Respondent.

Lease — Title to Pursue—Warrandice.—A tack was granted to a tenant, "his heirs, assignees, and sub-tenants," with warrandice to him and "his foresaid;" the tenant granted a sub-tack with a clause of warrandice, but did not assign the warrandice in the tack; and the tack was reduced as ultra vires of the granter, and the sub-tenant thereupon removed: Held (reversing the judgment of the Court of Session), that the sub-tenant had no title to sue a direct action of damages founded on the warrandice in the tack against the landlord.

In the month of February 1807 William Duke of Queensberry let by his commissioner, Mr. Crawford Tait, W. S., to "William Lorimer and his heirs, assignees, and sub-tenants,"

Oct. 12, 1831.

2^D DIVISION.
Ld. Cringletie.

Oct. 12, 1831. the farm of Ingleston, forming part of his entailed estate, for nineteen years, from and after Whitsunday 1806, on payment of a grassum of 51*l.* and an annual rent of 40*l.*, besides other prestations.

The deed of lease contained the following clause of warrandice:—"which tack the said Crawford Tait, as commissioner aforesaid, binds and obliges the said William Duke of Queensberry, and his heirs and successors, to warrant to the said Wm. Lorimer and his aforesaid, at all hands and against all mortals, as law will."

Lorimer entered to possession, but in the month of June 1811 granted a sub-tack to Mackill Maxwell for the remaining years of the lease, on payment of a grassum of 25*l.* and an annual rent of 32*l.* No express assignation was granted by Lorimer of the obligation of warrandice undertaken by the Duke; but he himself granted an obligation to warrant the sub-lease.

On the death of the Duke, Sir James Montgomerie and others were confirmed as his executors; his successor in the entailed estate then brought actions of reduction of several of the leases, and among others of that granted to Lorimer, in respect that they had been made in violation of the entail. The tenants immediately intimated claims of relief against the executors, who alleged that they thereupon adopted proceedings in the Court of Chancery in England, in relation to these claims, and that appearance was there made by the tenants. As the executors had thus the chief interest to resist the actions of reduction, they sisted themselves as parties to them; and after a great deal of litigation decree of reduction was pronounced on the 22d of February 1822; and Maxwell, in consequence thereof and of a decree of removing against Lorimer, the principal tenant removed from his farm at Whitsunday of that year.

At this time there were still three years of his sub-lease to run, and Lorimer having died, Maxwell brought an action founding on the lease and sub-lease against the executors, Crawford Tait, as commissioner of Duke William, and against Lorimer's son as his father's representative, concluding, *inter alia*, "for payment of the sum of 150*l.* sterling per annum, or such other sum, less or more, as our said Lords shall modify, for each of those three years of the said sub-tack which remained unexpired at the pursuer's removal from the said lands, as above

Oct. 12, 1831.

“ mentioned, and that in name of damages for the loss sustained
 “ by the pursuer in consequence of his being expelled from the
 “ said lands before the expiry of the period stipulated by the
 “ said sub-tack, with the periodical interest accruing upon the
 “ said annual payments, from the several dates at which the same
 “ ought to have been paid till payment thereof, calculating the
 “ said payments to be made half-yearly, and at the terms at
 “ which the sub-rents would have been payable, deducting there-
 “ from such sums as the defenders can instruct that the pursuer
 “ has already received to account of said damage ;” besides so-
 latium and expenses.

Preliminary defences were lodged by the executors maintaining, that as the contract of lease was not made between the Duke and Maxwell, but with Lorimer, and as Maxwell had no assignation to the obligation of warrandice, he could not insist in a direct action against the Duke or his representatives.

To this it was answered, that the lease was granted to Lorimer and his sub-tenants, and the Duke bound himself to warrant it to him “ and his aforesaid,” meaning thereby sub-tenants, and as Maxwell was a sub-tenant he was entitled to enforce that obligation.

The Lord Ordinary, after ordering Cases on this preliminary defence, repelled it, found the executors liable in expenses, and stated his opinion in the subjoined note.* Against this

* “ In this case Mr. Tait, as commissioner for the late Duke of Queensberry, let
 “ in 1807, for nineteen years, the farm of Ingleston to William Lorimer, and his
 “ heirs, assignees, and sub-tenants, for a certain rent, the amount of which is of no
 “ importance to the question now at issue. The clause of warrandice in that lease is
 “ absolute, viz. to warrant the lease to the said William Lorimer and his foresaids at
 “ all hands.

“ Lorimer sub-let parts of the subject to the pursuer by a regular sub-lease in 1810,
 “ which latter entered to, and continued in the possession of the subject of the sub-
 “ lease. The Duke of Buccleuch obtained a decree of this Court against Lorimer,
 “ setting aside the principal lease, and ordaining him to remove as at Whitsunday
 “ 1822; and although the pursuer Mackill Maxwell was not a party to that reduc-
 “ tion and removing, and therefore, if the decree had been unduly or illegally
 “ obtained, might have retained possession; yet, knowing that the principle on which
 “ his lease might have been supported had in the case of Hyslop of Halscar been
 “ discussed, both in this Court and in the House of Lords, and decided against
 “ him, he, with great propriety, gave up the possession to the Duke of Buccleuch,
 “ knowing well that the consequence of his declining so to do would be that his
 “ Grace would raise a reduction and removing against him, in which he must prevail;

Oct. 12, 1831. interlocutor the executors reclaimed, and on advising the cause on the 18th of November, 1826, the Judges were

“ and the only result would have been the incurring of unnecessary and idle expense,
 “ which the Lord Ordinary thinks was wisely avoided.

“ Such being the case, Mr. Maxwell has brought this action against the heirs of
 “ Lorimer, the principal tacksman, and also against the executors of the late Duke
 “ of Queensberry, concluding for damages on account of the sub-lease having been
 “ brought to an end before the period of its natural expiry. There is no dispute
 “ that the heirs of Lorimer are liable to the pursuer; but a question is here raised
 “ by the executors, whether they are directly liable to the pursuer or not.

“ The Lord Ordinary trusts that these defenders will forgive him for observing,
 “ that in using this plea (even supposing it to be well founded, of which immediately)
 “ their conduct is not a little contradictory. Being Lord Ordinary in all these
 “ Queensberry cases, the Lord Ordinary knows that these executors have appeared
 “ in various cases in which they have not been called as parties, for the best reason
 “ in the world, that they alone, and not the defenders called, have the real interest
 “ in the matter at issue. For instance, in the case of all the tenants of the Queens-
 “ berry estate, the period at which their bonâ fide possession was found to cease was
 “ Martinmas 1819; and as they did not remove till Whitsunday 1822, his Grace of
 “ Buccleuch claimed violent profits for the period between these two terms of Mar-
 “ tinmas 1819 and Whitsunday 1822. It being obvious that the tenants had little
 “ interest to oppose the Duke, because whatever his Grace obtained from them they
 “ were entitled to draw back from the executors of the Duke of Queensberry, the
 “ latter desired leave to sist themselves as parties, that they might resist any improper
 “ claim; and accordingly in many of these cases they are voluntarily parties, though
 “ not called in the action. Now, in this case the heirs of Lorimer are called; they
 “ have little interest to resist the pursuer's claim of damages; because in the same
 “ way they will obtain relief from the executors; and yet these defenders, though
 “ made parties—though having the real interest to defend the cause—though sisting
 “ themselves as parties where they are not called, because they have the same interest
 “ that arises in this action, refuse to plead in it, because, as they say, they are not
 “ directly liable to the pursuer. The Lord Ordinary must confess that this conduct
 “ appears to him to be not a little inconsistent, even if it were well founded.

“ But the Lord Ordinary considers that they are directly liable to the pursuer.
 “ The lease was granted to William Lorimer, his heirs, assignees, and sub-tenants.
 “ The Lord Ordinary thinks that the true import of this is, that the landlord gave
 “ power to his tenant to name a sub-tenant; that when a sub-tenant was named, the
 “ landlord granted the lease to him, and bound himself to warrant that sub-lease to
 “ the sub-tenant at all hands. The lease was granted as much to a sub-tenant as to
 “ the principal tacksman; and of course no assignation to the clause of warrandice
 “ was necessary, because the principal lease warranted the sub-lease the moment that
 “ it existed.

“ As to Mr. Tait being called as a defender, that was done for sake of having all
 “ parties concerned in the transaction brought into Court; but when the executors
 “ acknowledge Mr. Tait's powers to grant the lease, he, of course, drops out of the
 “ field, and the pursuers do not insist for any decree against him.

“ The Lord Ordinary can figure a case in which the landlord would not be liable
 “ to the sub-tenant for breach of the contract, ex. gr., if the principal tenant have in

equally divided in opinion.* The case was again advised Oct. 12, 1831.
(6th March 1827), when the Judges delivered the subjoined

“ the sub-lease bound himself to give advantages to the sub-tenant which were not
“ given to himself in the principal lease. But when the matter turns (as it does
“ here) on the right of the landlord to give the lease at all, and it has been found
“ that he had no power to grant it, the Lord Ordinary thinks that the warrandice
“ granted to the principal tenant and his sub-tenants renders the landlord directly
“ liable to the one as well as to the other, and that it was proper to make both parties
“ to this action, that the landlord’s representatives, who do not so much as pretend
“ that they are not ultimately liable, should have an opportunity of seeing that no
“ undue advantage is taken of them. Nor can the Lord Ordinary discover any pos-
“ sible benefit that can arise to the defenders by their present plea being sustained ;
“ far the only consequence must be, that the defender, the principal tenant, would
“ raise an action of relief against them ; and as they do not deny their liability to
“ relieve, the result is the occasioning of unnecessary trouble and expense, and
“ nothing else.”

* The following opinions were laid before the House :—

Lord Glenlee.—There are many things stated in Lord Cringletie’s interlocutor which I would entirely throw out of view. The question is, whether the sub-lease is the same as if there had been a conveyance by assignation to the warrandice in the principal lease ; that is, whether the principal tack is so worded as to supersede the necessity of an assignation ? The landlord by this tack authorises a sub-tack to sub-tenants. He lets to the principal tenant, and to his heirs, assignees, and sub-tenants. The consequence of that is, that the word “ aforesaid,” in the clause of warrandice, applies to all the persons mentioned in the leasing clause, viz. heirs, assignees, and sub-tenants ; that is to say, he warrants the sub-tack when it should be granted. If the sub-tack had contained a clause binding and obliging the tenant to assign his right of warrandice, it is clear that the sub-tenant might have come against the landlord ; and I do not see that there ought to be any difference in the present case.

Lord Pitmilley.—I confess that I read these papers not without considerable doubt how far the interlocutor of the Lord Ordinary was founded in law. The interest of the parties may very properly be stated, but must not rule us in deciding this point of law. The landlord made no bargain with the sub-tenant ; he contracted with the tenant, who again contracted with the sub-tenant. The landlord must fulfil his contract with Lorimer, and Lorimer with the sub-tenant. The puzzle arises from a very incorrect expression in the lease. A landlord cannot be said to let to sub-tenants. The expression can only be construed as a power to sub-set ; when taken literally it is inexplicable. No doubt Lorimer might have assigned his lease, but he has not done so ; therefore the landlord is only liable to Lorimer, and Lorimer is liable to the sub-tenant. It may be unimportant in the present case, whether the recourse be taken directly or indirectly ; but it is a point of law which I am bound to decide without reference to the interest of the parties.

Lord Alloway.—I am not surprised that this point arose. The question is, whether, from the words of this lease, the sub-tenant is entitled to call on the landlord directly. My opinion coincides with that of Lord Glenlee, that he is so entitled. Supposing an assignation had been granted, where is the question ? None. Now, the warrandice runs to heirs, assignees, and sub-tenants. Would it not have been considered an unnecessary expense to grant an assignation, when the Duke warrants expressly to sub-tenants ? It is said, and has not been contradicted, that this clause

Oct. 12, 1831. opinions.* The opinions of the Judges of the First Division, and

was in every lease upon the estate. It could not, then, have been inserted by mistake; and I see the reason of its insertion. It was to induce people to take sub-leases. If the lease is so warranted, what is the use of assigning? I was at first puzzled with this case; but, on consideration, I am satisfied that the Lord Ordinary is right. I cannot see the interest of the petitioners to object; but, at all events, the law of the case appears to me as I have stated.

Lord Justice Clerk.—My doubts are not removed by the very able answer in this case, nor by the opinions I have just heard; and I may take notice, that when a case is first presented to us, if we are equally divided in opinion, it is not to be considered that we finally dispose of the case, but that we will deliberate farther and more maturely upon it. I read with great care the notes of the Lord Ordinary, upon which this very short interlocutor is founded; and I must say that there is much matter in these notes which I cannot see the force of. The Queensberry cases are just to be dealt with as every other set of causes. His lordship says, that it will be a matter of indifference ultimately to the executors. He proceeds to make a number of statements as to the proceedings of the executors in other cases, and puts it ad verendum to them, that they maintain this defence. All this I think should be laid aside, and the point decided as in any common case; but, in fact, a great interest does arise to the executors to have this point decided, and a danger has been stated as likely to occur, which I think it was their duty to state, as responsible executors taking charge of this great estate. Nor has their statement as to that danger been contradicted. But the question here is, whether the sub-tenant has a right to come directly against the representatives of the landlord? It is not pretended that he had any contract directly with the landlord. Why then pass by Lorimer, who is directly liable to him?

Moncrieff for Maxwell.—He is called.

Lord Justice Clerk.—Why not exhaust him? There might have been a hundred transactions with different sub-tenants under the same lease, all of whom, it is said, may come directly against the landlord. In the first place, then, there is no direct bargain with the landlord. In the second place, there is no direct assignation of the obligation in the principal lease. There is a considerable analogy between the principle applied to the question of violent profits and the present case; and I expected Mr. Jeffrey (for the executors) to notice that point, as he did. The heir of entail got a decree in the March cases directly against the tenants and the executors conjunctly and severally. This was the judgment of the First Division, and it was reversed upon appeal. In our Division the judgment was not so given, and it was affirmed. The Lord Ordinary seems to be aware, that if there be any thing in the sub-lease which is not in the principal lease, this remedy would not apply. If so, it shews that the sub-tenant is not entitled to maintain, on the words of the lease, that the landlord has come under a direct obligation to him. The plain meaning is just a complete power to sub-set. Supposing that there had been an assignation, an assignee may grant a sub-tack; can it be maintained that the assignee's sub-tenant would have had direct recourse against the landlord? We shall reconsider this case. We shall be happy to receive any other authorities, or any other light the bar may have to throw on the question.

* *Lord Justice Clerk.*—I have again considered this case; but though the matter really appears to me of no great significance, my opinion with regard to the point of form remains unaltered. I still think the action must be brought against the prin-

of the permanent Lords Ordinary, were thereupon required, Oct. 12, 1851.

principal tenant in the first instance. We cannot here deal with the sub-tenant in the same way as with an heir, or even with an assignee, who step into the place of the principal tenant, and are substituted in all his rights and liabilities. Not so the sub-tenant; he is not connected with the landlord, like an assignee. I can read in the principal tack, that the landlord "lets to the said William Lorimer, and his heirs and assignees and sub-tenants;" and no doubt under this clause the tenant is entitled to assign, and also to sub-set. But these are very different things; when he sub-sets he does not assign, nor is the sub-tenant placed, with respect to the landlord, in the same situation as an assignee. The words I have quoted cannot be understood as conveying a direct lease to the sub-tenant. The transaction is with the principal alone; and the clause, so far as it refers to sub-tenants, must just be considered as a short form of expressing the leave which it gives to the principal tenant to sub-set. If a sub-set afterwards takes place, that is merely a private transaction, in which the landlord is no party. The counsel for the Duke of Queensberry's trustees supposes the case of a sub-lease at a reduced rent; and very justly points out the hardship that might attend in certain circumstances,—an action of repetition directly against the landlord. But suppose another case:—Lorimer sub-lets for a rent of 100*l.*, the same as under the principal tack, but he takes a grassum of 5*l.* The lease is reduced, and the sub-tenant, in order to be satisfied for his damages and loss, is entitled, no doubt, to a repetition of the grassum. But from whom? Not certainly from the landlord. If this practice were allowed, it is clear that it might enable the principal tenant to pocket enormous grassums to the landlord's prejudice. In short, I think the sub-lease a mere private contract betwixt the principal and sub-tenant; as such it is directly obligatory on the one and the other, but not on the landlord. I cannot regard it as equivalent to an assignation, but merely as an exercise of the power to sub-let; for when I look at the sub-lease, I do not find in it the terms by which an assignation is effected, and without such an assignation no direct obligation is created against the landlord. With these views I cannot concur in the judgment of the Lord Ordinary. In the reasonings of the note which accompanies that judgment there is a great deal said in reference to the trustees; but with this, as it is merely argumentum ad hominem, I conceive we have nothing whatever to do. We have to decide only on a pure question of law.

Lord Alloway.—I have only to repeat what I have said before. The principal tack contains a clause of warrandice to Lorimer and his foresaids, sub-tenants among the rest. Now what does Lorimer do? He grants a sub-lease by virtue of the clause in the original tack, which, as I conceive, was meant for enabling the principal tenant to sub-let without the necessity of the sub-tenant going to the landlord; and the warrandice contained in the original tack is at the same time granted in favour of the sub-tenant. Well, the tacks are reduced, and an action for damages is brought by the sub-tenant directly against the trustees acting for the landlord. The whole question is, Whether he is entitled to call the trustees as parties immediately liable? I think he is. I see no reason at all why the arrangement which the landlord made for sub-letting, by putting this in the power of the principal tenant, should have the effect of prohibiting him from calling the trustees directly in his action of damages. If any question should arise, as suggested by the counsel for the trustees, in consequence of the different interests of parties, there is an easy and obvious remedy. The sub-tenant may bring all concerned into the field,—the principal tenant along with the trustees; and may leave these parties to adjust the matter betwixt themselves accord-

Oct. 12, 1831. which being returned*, the Court (11th July 1827) adhered to the interlocutor of the Lord Ordinary.†

ing to their respective interests. I shall only add, that this man might, if he had chosen, not have allowed the decree of reduction to have any effect against him; but if he had resisted, would have been altogether inexcusable, because that would only have had the effect of putting the trustees to additional expenses; so that, I think, nothing can be inferred against his rights from his acquiescence in the decree. I retain my former opinion.

Lord Glenlee.—I also adhere to what I said before. The principal tack authorises the tenant to relet by a second deed, and grants warrandice to the sub-tenant in the same way and to the same extent as the principal. There is virtually but one transaction; for all sub-tacks refer to the terms and conditions of the original, which proves the connection subsisting and meant to subsist between the sub-tenant and the landlord. The case is just such a one as this:—I receive a commission from a friend to sell an estate, which commission contains an obligation of warrandice on his part. If the warrandice fail, will you say that the party who granted me the commission cannot be called directly by the purchaser? No doubt it was I who sold the estate under the commission, but it was upon the faith of the obligations contained in it that the estate was bought. The case is similar to the present. If a farm is evicted, and altogether taken out of the tenant's hands, notwithstanding of the warrandice, I think the sub-tenant has a direct action for damages against the landlord, who gave a sort of commission by the principal tack to the tenant to sub-let.

Lord Pitmilley.—The point here in dispute is so narrow, it had been better perhaps could the parties have made some private arrangement. It relates entirely to the form of proceeding, by which the sub-tenant may enforce his claim against the executors; for there is no doubt that they are ultimately liable in whatever may be claimed by the sub-tenant from the principal. On this there is no dispute,—none, at least, in this particular case. The question here is, Whether the executors are directly liable in damages to the sub-tenant, they being admitted to be liable to the principal in relief? This is the shape of the case; and I see no reason for altering the opinion which I formerly expressed. I think that the executors, in strictness, did not contract with the sub-tenant. The clause in the original lease only declares, in an awkward way, the power which was meant to be given to the tenant to sub-let. Therefore I think it was a contract only betwixt the landlord and the principal tenant, and that the sub-tenant was no party at all. It may be perhaps as well that this action should be sisted until Lorimer brings his action.

Moncrieff.—He has done so already.

Jeffrey.—But there would be nothing to prevent his coming again.

Moncrieff.—He is now a bankrupt.

Lord Pitmilley.—If we must decide at present, I adhere to my former opinion.

Lord Justice Clerk.—As the Judges of this Division remain equally divided in opinion, we must take the opinions of the other Judges.

† 5 S. D. No. 464.

* *Lords President, Craigie, Balgray, Gillies, Cringletie, Meadowbank, Mackenzie, Eldin, and Corehouse.*—“ We are of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. Cases may perhaps be figured, in which, from special circumstances, a sub-tenant would not have a direct claim against his landlord.

The Executors appealed.

Oct. 12, 1831.

Appellants.—1. Although at first sight it may not be apparent that the appellants have a material interest in defence of the

But in all cases, such as this, where the tack is expressly given to the principal tenant, his heirs, assignees, and sub-tenants, and where the warrandice is granted to the principal tenant and his foressaids, we are of opinion that the sub-tenant acquires every right competent to the principal, and can sue his landlord accordingly."

Lords Medwyn and Newton.—In 1807 a lease of the lands of Ingleston is granted by the commissioner of the late Duke of Queensberry to William Lorimer, for payment of 40*l.* yearly and a grassum of 51*l.* In 1811 Lorimer sub-sets a part of this farm to Mackill Maxwell, for payment of a rent of 32*l.* and a grassum of 25*l.* To this sub-tack the landlord was not a party; but by the principal lease the power of sub-setting was allowed, the lease having been granted to Lorimer, "and his heirs, assignees, and sub-tenants." The lease having been set aside by the heir of entail, the sub-tenant has brought a summons of relief and damages, calling both the executors of the Duke and the heir of Lorimer as defenders. We are of opinion, that the Duke of Queensberry, not having been a party to the contract by which the relation of sub-tenant was constituted, the sub-tenant has no direct action against the landlord or his representatives, but can only claim damages from the principal tenant with whom he contracted, who, again, will be entitled to claim damages from the landlord in virtue of the lease granted to him. For a lease is a bilateral contract, in which the contracting parties are the landlord and tenant, and it seems to us that none but those contracting parties, or their representatives, can maintain any action for implement of this contract. In like manner, the parties to a sub-lease are the tenant and sub-tenant, and it imposes obligations on them alone. The landlord is no party to this contract: the sub-tenant is the tenant, not of the landlord, but of the principal tenant. The landlord could not bring any action against the sub-tenant in virtue of the sub-lease, and to compel implement of it; and if the sub-tenant has discharged the obligations incumbent upon him to the tenant, he is secured from all further demand, however much the rent due to the landlord may be in arrear. On the other hand, the sub-tenant can make no direct claim against the landlord, who is no party to his contract—his recourse lies against the tenant, under the warrandice, expressed or implied, in the sub-lease. But it is said, that the lease here is granted to Lorimer, "his heirs, assignees, and sub-tenants," and that the clause of warrandice being to "the tenant and his aforesaids," this necessarily includes sub-tenants, and makes them parties to the original contract of lease, giving them a direct right of action against the landlord under the clause of warrandice. We cannot view the introduction of the word "sub-tenants" into the leasing clause, as being any thing else than an abbreviated form of giving the power of sub-setting, which the tenant otherwise would not have had, nor as intended or calculated to serve any other purpose. For it is absurd to say that the landlord lets to the sub-tenants, and that they are thus directly bound to each other. The sub-lease is a distinct contract between the tenant and sub-tenant, which in this case the landlord permits, but to which he is no party; the sub-tenant does not hold directly under the landlord, nor does he become the lessee under the landlord. For the tenant sub-setting does not in any respect divest himself of his right under the principal tack; he is still the person, and the

Oct. 12, 1831. estate confided to their care to maintain their present plea, yet in fact they have so. It is true that they may be reached cir-

only person, bound to the landlord; and although he has constituted with a third party a new relation between himself and that third party, there is no transference to that other of any of the landlord's obligations; so that he can claim nothing but from the person who has bound himself to him, that is the tenant. The tenant pays the rent stipulated in his lease to the landlord, and the sub-tenant again pays what he has agreed to do to the tenant. The sub-tenant stands precisely in the same relation to the tenant that the tenant does to the landlord, and vice versa. If the sub-tenant falls into arrear, the tenant pursues him for payment, and uses the right of hypothec, or irritates the sub-lease. If the tenant fails in fulfilling any of the obligations incumbent on him, which may be quite different from those in the principal lease, the sub-tenant has his remedy by an action upon the sub-lease against the tenant. If then the introduction of the word "sub-tenants" into the leasing clause cannot have been with the view of altering entirely the character of sub-tenant in relation to the landlord, the clause of warrandice, "to the tenant and his aforesaid," must be construed in conformity with the real meaning of the parties, so as to import nothing but that the landlord warrants the lease to the tenant, or his successors in the lease. But it is further said that an assignee to the lease would be entitled to claim fulfilment directly from the landlord, and that a sub-tenant should have the same right. This, however, entirely overlooks the distinction between an assignee and a sub-tenant. A tenant having the power of assigning his lease may assign or make over his right in it to another, without the concurrence of the other contracting party; the assignee is substituted in the place of the cedent; he becomes in effect a party to the original contract, the obligations in which are made over to him, and they come to be directly prestable to him, the cedent being entirely divested, (*Skene against Greenhill*, 20th May 1825,) and of course no longer having any power or right to enforce them. If *Lorimer* had assigned his lease to the present pursuer, then he would have had right to enforce against the landlord all the obligations incumbent upon him by the lease, instead of *Lorimer*, who could no longer have enforced any such. Any action at the instance of the assignee would have been an action in fulfilment of the lease, now transferred into his person, and to which no other person had right. The assignee, in fact, comes into the place of the tenant in all respects, and displaces him in the relation originally constituted between the landlord and him. A sub-tenant, as already observed, does not come in the place of the tenant, nor does he take up his character. He is not the representative of the tenant, nor his successor in the lease. Originally it was not even competent to give a sub-lease of a whole farm. *Bowack v. Croll*, 22d June 1748. *Kilk. voce Tack*.—And a power to sub-set imported only a power to sub-set a part, the tenant still occupying the situation of tacksman of the whole under the landlord, and that of occupier of some part of it himself. Now that a sub-set of the whole is not objectionable in point of law, although as to possession the two are assimilated; yet so different in character are assignees and sub-tenants still considered, that an exclusion of the one does not import any exclusion of the other. When a sub-tenant's possession has been cut off through any defect in the landlord's right, and if a claim of damages be brought by him against the landlord, it may sometimes be of no consequence to the landlord whether this question be settled with him or with the principal tenant. But it may often be otherwise. If the obligations stipulated in the sub-lease by the

cautiously; the sub-tenant may perhaps take decree against the principal tenant, and the latter may thereupon raise his action of relief against the appellants; but it is important to the

Oct. 12, 1832.

two contracting parties to each other are different from those in which the landlord and tenant are bound to each other in the principal lease, it is quite clear that the sub-tenant can only obtain the fulfilment of the obligations in the contract to which he is a party, and the landlord (who is liable to the tenant for the damages sustained by him, which must be established in a separate action at the instance of the tenant,) ought not to be involved in the trouble and expense of ascertaining and adjusting also the separate and distinct claim of damages which the sub-tenant is entitled to recover under his contract with the tenant, arising no doubt out of the same fact, the want of power in the landlord, but founded on a different contract, and embracing totally different elements of calculation. Although a tenant is not now restricted to sub-set only a part of a farm, he may do so (in fact, in the present case, only a part has been sub-set); he may sub-set different portions to ten or twelve sub-tenants under different contracts. On the reduction of his own lease, each sub-tenant will have a separate claim of damages arising out of the particular obligations of each sub-lease, greater or smaller, in proportion as the terms of each were more or less favourable to the sub-tenant. Would it be reasonable to make the landlord a party in each of these separate actions, and, where he had entered only into one contract, oblige him to become a defender in ten or twelve actions, by different pursuers, claiming each a portion of the single claim of damage due from him to the tenant? It might perfectly well be conceived, that the whole amount of the claims of the various sub-tenants against the tenant should exceed the claims of the tenant against the landlord, and it would thus be impossible to give decree in such actions against both tenant and landlord conjunctly and severally; for while each sub-tenant would be entitled to decree against the tenant for his full claim he could only have right to a rateable decree along with the other sub-tenants, against the landlord, in proportion to the damage each has proved to the extent of what it is ascertained the landlord had incurred to the tenant. But no such ranking as this was ever heard of. Nay, farther, suppose the sub-tenant again to sub-set, (and it will be observed, the sub-tack in this case is to Maxwell, his heirs, assignees, or sub-tenants,) and thus to divide his possession into other smaller portions with varying obligations, would each of these sub-tenants of the sub-tenant be entitled to maintain an action directly against the landlord? The same argument which makes such an action competent to the sub-tenant would equally entitle the sub-tenants under the sub-tenant to institute similar actions. This would lead to great embarrassment, and very intricate questions, in adjusting the damages arising out of each separate contract; it is directly contrary to principle that any person should be called on to pay damages for non-implement of a contract to which he is not a party; and such a procedure is quite unnecessary for the ends of justice, as the damage can be much more easily and equitably adjusted, when the parties claim each under their own contract and against the party with whom they contracted, the sub-tenants against the tenant, and the tenant against the landlord; while no authority has been adduced sanctioning any different mode of procedure, for the only analogy which has been brought in support of such an attempt entirely fails; the assignee to a lease coming directly in place of the cedent, the lessee, and sustaining his character in the enforcement alike of the obligations incumbent by him, as in those stipulated in his favour.

Oct. 12, 1851.

estate that this mode of proceeding should be adopted, because the number of actions against the appellants will be thereby much more limited than if they were raised at the instance of sub-tenants, whose numbers may be as great as there are acres in the estate. Besides, the appellants have good grounds of compensation and other defences personal to the principal tenant, which they cannot plead against a sub-tenant.

2. It does not seem to be disputed that in the general case no action of damages arising out of a breach of contract can be maintained, except as between the contracting parties, or their heirs and assignees. In the present case it is admitted that the respondent was not one of the contracting parties, and that he holds no assignation to the contract or to the obligation of warrandice, on which his claim is founded. It is said, however, that because the lease was granted in ordinary form to the tenant and his sub-tenants, accompanied by a relative obligation of warrandice, this confers a title on the respondent to demand damages. But two things which are essentially distinct are here confounded—the right or title to the land, and the title to sue for damages. The lease is granted with reference to the land; and indeed, unless a power to sub-let had been conferred the tenant could not have given a sub-lease. But this is altogether different from the right or title to sue for damages in respect of breach of contract. In the case of any ordinary contract it is not pretended that any one, except a party to the contract, or his heir or assignee, can maintain an action in respect of a breach of it. But that is precisely the case here; and the opinions which have been delivered rest on confounding this question with that as to the title to the land, which is one of an entirely different nature. Accordingly a judgment adverse to that complained of was pronounced by this House in the case between the appellants and the Earl of Wemyss, on the 10th of March 1824.*

Respondent.—1. The appellants have no substantial or legal interest to maintain their present plea, because they admit that so soon as decree is pronounced against the principal tenant, action may be competently raised against them; and it is

* 2 Shaw's App. Ca. 70.

not alleged that in this case they have any available defence against the tenant. Oct. 12, 1851.

2. But they are precluded by the terms of the obligation from maintaining the plea, because they thereby expressly bound themselves to warrant the lease, not only to Lorimer, but also to those who might be his sub-tenants. Now it is not disputed that the respondent is a sub-tenant, and the fact is proved by production of his sub-lease. It might as well be contended, if an action were brought by an heir, who proved his character by production of his service, that he was not entitled to sue because he was not a direct contracting party, as that the appellant is not entitled to insist. If there had been no obligation in favour of heirs there might have been some plausibility in such a plea; but where it is expressly in favour of heirs, it is obviously not tenable. The two cases are precisely similar, for here the obligation is granted directly in favour of sub-tenants, and the respondent produces his title to that character.

LORD LYNTHURST.—My Lords, in this case a lease was granted by the late Duke of Queensberry, (whose name has been very familiar to this House in consequence of suits arising out of leases granted by that nobleman, but which he had no right to grant,) to a person of the name of Lorimer. Lorimer underlet a part of the premises to Maxwell, who is the respondent in this appeal, and in that underletting the terms of the lease were these: “The said Craufurd Tait, “the Duke’s agent, has set, and for and in consideration of the grassum “and yearly real or tack-duty, and other payments and prestations, “does hereby set, and in tack and assedation, let to the said William “Lorimer, and his heirs, assignees, and sub-tenants,” the premises in question. Then there was a warranty of the tack “to the said William “Lorimer and his aforesaid.” Such were the terms of the original lease, as far as it is necessary to refer to them for the purpose of this argument. After several years of the under-lease to Maxwell had run out, and after the death of the Duke of Queensberry, proceedings were instituted for the purpose of setting aside the lease to Lorimer. An action of reduction was instituted, and the result was that the lease by the Duke to Lorimer (being a lease which the Duke had no power to grant) was set aside. No proceedings, however, were instituted for the purpose of setting aside the under-lease from Lorimer to Maxwell, nor do I apprehend that it was necessary such proceedings should have been instituted. Maxwell acquiesced in the decision against Lorimer, and it was not necessary that he should hold out and

Oct. 12, 1831. put the parties to the necessity of instituting a suit to reduce his lease; for all defence on his part must have been clearly unavailing. He stands therefore, I apprehend, in the same situation as if his lease had been declared void; and the sole question is, whether Maxwell has a right to maintain a suit against the representatives of the Duke of Queensberry, by reason of the damage he has sustained by the loss of his under-lease? Now, according to the general law, it is clear that no such action could be brought. The landlord has nothing to do with the under-tenant. The landlord lets to his immediate tenant, and if such tenant lets to an under-tenant, and the original lessee is ejected, the under-tenant can bring no action, nor institute any proceedings against the landlord. The contract is between the first lessee and his sub-lessee. The landlord has nothing to do with that contract. No action can be brought upon it by the under-tenant against the landlord. He must bring his action against the party with whom he contracted; and if he recovers damages against him, then the immediate tenant may bring his action over against the landlord; that is the regular course of proceeding. The only question is, whether, under the terms of this lease, there is any thing to take it out of the general rule? Reliance is, for this purpose, placed on the terms of the lease to Lorimer. The demise is to Lorimer, his heirs, assignees, and sub-tenants. This cannot be interpreted according to the ordinary import of the words. The demise cannot be to the sub-tenants; that would be to make them tenants of the original landlord, and not tenants of his lessee, which is their true situation and character. The contract of the sub-tenants is, as I have already said, with the lessee. There is no privity of contract (to use an English expression) between the sub-tenant and the original landlord. He has nothing to do with the landlord. How, then, are these words to be interpreted? The only reasonable interpretation to be put upon them, as it appears to me, is, that they were intended to convey a permission to underlet; but this, when acted upon by the lessee, will not create any contract or privity between the original landlord and the sub-tenant. We are then referred to the warranty. The original lessor warrants the tack (that is, Lorimer's tack—the whole tack) to the lessee and his aforesaid. The word "aforesaid" includes, it is said, the sub-tenant. If the word "aforesaid" is to be considered as including the sub-tenants, the only reasonable interpretation to be put upon it is, I think, this, that the original lessor contracts with his immediate lessee for the quiet enjoyment of the lessee's sub-tenants. But this is a contract with the lessee, and not with the sub-tenant, and upon which no right of action can accrue to the sub-tenant. It is otherwise as to the heirs and assignees of the original lessor. They are substituted for the lessee, both as to the estate and as to the contract.

But in the case of a sub-tenant it is different. The estate of the first lessee continues, and there is no transfer of the estate or of the contract. The contract remains between the original lessee and his landlord, and supports his estate. It does not appear to me, therefore, that the sub-tenant has, in the event of eviction, any immediate remedy against the superior landlord. The remedy is against his own lessor, who will, in his turn, have a right, upon the warranty, to compensation from the original landlord. The respondent must therefore look to Lorimer, and Lorimer will then have his remedy over against the persons representing the Duke. Under these circumstances, therefore, I should propose to your Lordships, that the judgment of the Court below be reversed.

Oct. 12, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellants' Authorities.—Queensberry's Executors, March 10, 1824 (2 Shaw's App. Ca. 70.); Ronaldson, Dec. 18, 1812. (F.C.)

Respondent's Authorities.—1 Bell on Leases, 470; 2 Stair 9, 22; Downie, Jan. 31, 1815. (F.C.)

J. CHALMER—MONCRIEFF, WEBSTER, and THOMSON,—
Solicitors.

WILLIAM INGLIS and others, Appellants.—*Jeffrey—Ivory.*

No. 60.

JAMES HARPER, Respondent.

Testament—Legacy—Proof.—A party by a probative testament appointed a person, who would not otherwise have succeeded, to be her executor, “subject to the payment of such bequests as I may instruct him to pay, in a letter signed by me of this date, to the several persons therein named;” declaring, that “after these several persons therein named have been paid and discharged their several legacies,” the whole residue should belong to the executor; and the testator died two days thereafter, leaving this will in her repositories, with a letter within it containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by her, but not holograph nor tested; which letter, it was offered to be proved, had been signed by the testator simul ac semel with the testament—Held (reversing the judgment of the Court of Session), that it was competent to prove the identity of the letter with that referred to in the will; and the case remitted, with an issue to that effect.

MRS. MARGARET MATHESON, on the 15th of May 1826, executed a deed of settlement in the following terms:—“I, Mrs. Margaret Matheson, &c., hereby declare my intentions respecting the disposal of my moveable estate in case of my death. (1.) I

Oct. 18, 1831.

2D DIVISION.
Lds. Mackenzie
and
Medwyn.

Oct. 18, 1881.

“ appoint my cousin James Harper, Esq., of Morningfield near
 “ Aberdeen, to be my sole and only executor and intromitter
 “ with my means and estate, wherever situated, which may be-
 “ long to me at the time of my death, subject always to the pay-
 “ ment of my lawful debts, of every kind whatever, which may
 “ be due by me, and subject also to the payment of such be-
 “ quests as I may instruct him to pay, in a letter signed by me
 “ of this date, to the several persons therein named; which
 “ bequests or legacies I expressly will and declare are a real
 “ and effectual burden upon my executry funds. (2.) I declare
 “ that after these several persons therein named have been paid
 “ and discharged their several legacies, the whole residue shall
 “ belong exclusively to the said James Harper.” This deed was
 duly tested; and at Mrs. Matheson’s death, which happened two
 days after its execution, it was found in her repositories, and
 within it a letter of the same date with the will, the date of the
 month being written at length, and not in figures, and bearing
 to be signed by Mrs. Matheson, but not holograph nor tested.
 The letter was addressed to Harper, but not in the handwriting
 of the deceased. It was in these terms:—“ Dear Cousin, Re-
 “ ferring to my testament of this date, whereby you are named
 “ and appointed my sole and only executor, under burden of
 “ paying my just debts, and the following legacies which I desire
 “ and require you to pay within three months after my death.”—
 Then followed seven different bequests, all numbered succes-
 sively, and, inter alia, (1.) “ To William Inglis, Esq. W. S., or
 “ his heirs, 1,000*l*.” (3.) “ To Miss Buchan, my cousin, 300*l*.”
 and there was also a legacy of 1,000*l*. to a Mr. Barr, the writer
 of the will. This letter was written on two pages of the same
 leaf, and signed, according to the ordinary form of letters, on
 the last page only, the principal legacies being contained on the
 first page.

Founding on the will, and this letter as that therein referred
 to, Inglis and Miss Buchan raised separate actions against
 Harper for payment of their legacies. In addition to the cir-
 cumstances above mentioned they averred, that the letter was
 written by the same agent who wrote the will; that it was
 signed by the deceased simul ac semel with the will, and in pre-
 sence of the witnesses who attested the subscription of the de-
 ceased to that document; and that it was then put up by the
 deceased along with the will, and found “ therein,” (as stated in

Oct. 18, 1891.

the report of the commissary clerk,) at opening the repositories, which had been sealed up immediately on her death. These averments were offered to be proved *comparatione literarum*, and by parole.

The defender refused to admit that the letter was subscribed by Mrs. Matheson; and he pleaded, that, not being probative under the act 1681, it could not be received as evidence of the will of the deceased, and that this defect could not be supplied by parole evidence.

The action at the instance of Inglis having come before Lord Medwyn, his Lordship found “that the offer of proof “contained in the condescendence is not relevant in order to “supply the want of the statutory solemnities of writs,” and assoilzied the defender, and issued the subjoined note.*

A reclaiming note was presented against the interlocutor, and Lord Mackenzie (before whom Miss Buchan’s action had come) ordered Cases in that action to the Court.

The Court (27th May 1828) conjoined the actions “in respect “that both actions are founded on the same document,” and in that at the instance of Inglis adhered to the Lord Ordinary’s interlocutor, and in the other assoilzied, but found no expenses due.†

Inglis and Buchan appealed.

* “The Lord Ordinary cannot adopt the interpretation of the pursuer, that the “latter will constitutes the defender executor, under burden of paying such bequests “as the testatrix shall direct in a letter not written, but merely signed, by her; and “so the question does not arise, whether it be competent to provide that legacies may “be constituted in an informal or improbate writing. It seems quite impossible to “distinguish this case from the case of Dundas against Lewis, 12th May 1807.”

† 6 Shaw and Dunlop, 864, where the opinions of the Judges will be found. The following notes of Lord Alloway’s opinion, revised by him, were laid before the House of Lords:—

Lord Alloway.—“This is a very difficult question,—not so much in considering “what was the intention of the testator, as whether it is supported by such a legal “expression of that intention as can be enforced by a court of law. If I considered “the case of Dundas against Lewis, referred to by Lord Glenlee, as decisive of the “question, I would have no difficulty, as I am always inclined to follow decided cases. “But I conceive, that there are important distinctions betwixt that case and the “present. Mrs. Matheson executed a settlement in favour of the defender Harper, “as her universal executor and disponent, but subject to the payment of her debts, and “of such bequests ‘as I may instruct him to pay, in a letter signed by me of this

Oct. 18, 1831.

Appellants.—(1.) The respondent succeeded to the deceased only by virtue of the will, and in such case a testator may im-

“ date to the several persons therein named ;’ which bequests or legacies she expressly
“ declares are a real and effectual burden upon her executor. This settlement was
“ written by a regular man of business, and is perfectly probative. But the letter
“ which is written by him, and subscribed by her before witnesses, and not tested by
“ them, is not probative. Amongst the legacies there was one of 300*l.* to the
“ pursuer, her cousin. In a former settlement she also left a legacy to the same
“ person, and of the same description. There could be little doubt, therefore, of the
“ intention. But was this a valid legacy, and supported by sufficient written evi-
“ dence? No nuncupative legacy, not supported by any regular deed or holograph
“ writing, can be effectual beyond 100*l.* Scots, even supposing that the intention of
“ the testator were demonstrated by the most complete parole evidence. No evidence
“ but writing can be received, and this written evidence must be probative. Thus, in
“ the case of Dundas, it was declared, that the trustees should hold any additional
“ directions which the testator should give them by writing under her hand as part
“ of the trust-deed. In a codicil she appointed a legacy of 50*l.* to be paid to
“ Mr. Forrester, and by another codicil she directed her bank stock to be paid to
“ Mr. Dundas. She subscribed both of these codicils, which were not holograph,
“ nor signed before witnesses. An objection was taken to these legacies as not being
“ effectual, and the Court sustained the objection. If this case were exactly similar,
“ a contrary judgment could hardly be expected from this Court. But there is a
“ distinction, which may fairly admit of a different interpretation. 1. In the
“ present case, the whole property of Mrs. Matheson is vested in Harper as her ex-
“ ecutor and residuary legatee, subject to one condition, viz.—the payment of the
“ legacies which she should direct him to pay by letter of that date. He could not
“ therefore, accept of the settlement, from which he has derived so great a benefit,
“ without also being liable to the condition to which she had subjected him. He was
“ quite a stranger to the succession, and could not claim the benefit of it by that
“ deed without being subject to all its conditions. A letter does not mean in general
“ a holograph deed, nor a probative one ; and, therefore, as the letter by which
“ these directions were given falls under the precise description of that mentioned in
“ her settlement, by which her executor was to be bound, there seems to be the fairest
“ reason for giving it effect. He could not approbate and reprobate the same deed.
“ He must be bound by the conditions which the party had attached to it. There
“ was nothing unlawful in stipulating that her executor should be bound by her
“ letter of that date. The meaning and description of a letter is perfectly understood.
“ Although the testator’s subscription to that letter was not admitted, yet it is not
“ seriously or distinctly denied ; and, therefore, it must be held to be admitted, unless
“ a reduction shall be brought on the head of forgery. In short, Mr. Harper, if he
“ makes his election to take the benefit of the deed, must be bound by it, and must
“ take it under all its conditions, and must be bound by the letter to which it refers.
“ This is quite different from the case of Dundas against Lewis. There the trustees
“ were to follow any directions which the testator might give them by a writing under
“ her hand. But a writing, by the law of Scotland, must always mean a formal and
“ probative writing, whereas a letter never bears that meaning, and not one letter in
“ a thousand is probative. It is not necessary that the deed referred to in a trust
“ deed shall be probative according to the law of Scotland.—See the case of Brack,

pose any burden, even that of paying legacies to be bequeathed by an improbate deed. Granting, therefore, that the will here implies nothing more than a power to declare legacies by a letter signed by the testator of the same date with the will, that power has been executed strictly in terms of the will. By using the term "letter" the idea of a tested deed is excluded; and by using the term "signed" merely it is plain that even a holograph letter

Oct. 18, 1831.

"determined unanimously last Session, where a Jamaica settlement, executed according to the law of that country, but not probative by the law of Scotland, was held to contain sufficient instructions to trustees to settle a large estate in terms of it. That case is not precisely the same with the present, but it depends upon a similar principle. 2. There is another point. When her repositories, which were regularly sealed up, were opened, this letter was found within the settlement. This is a connection betwixt the letter and the settlement by the deceased herself. Several cases have occurred, with regard to pinning bills to settlements, which strongly support the pursuer's view of the case. See the case of Miss Panton, Shaw and Dunlop, vol. ii. p. 632, with regard to the direction as to a bill. She had given directions to her trustees to pay certain sums out of certain bills.—'The bill within this paper you will give, 100*l.* to Miss Panton, 50*l.* to Janet Martin, my servant, and 5*l.* to my girl, Kitty Martin, after my death.' This document was holograph, and was found put up with her settlement, but there was no bill within the paper. But in another document she says,—'September 15, 1820.—The bill within this paper you will give, Miss Panton 100*l.*, Janet Martin, my servant, 100*l.*, to Kitty, my girly, 5*l.* Theis more, if Miss Mackies serve be with at time, let have the remaining 3*l.* St. L. DUNCAN. Bellfield, October 26, 1821.' The Court were unanimous in sustaining the list which was put up with the settlement, and the bill within it, although a part of it was not holograph. See the case of Melvin against Nicol, 20th May 1824; Shaw and Dunlop, iii. 31. That case bears a strong affinity to the present, in one respect. There the testator had bound his executor to pay any sums that he should direct, 'by a writing under my hand, however informal.' He addressed a letter to his executor, empowering her, at his death, to uplift 100*l.* sterling, which he had lodged in the branch of the Glasgow bank at Kirkaldy. At the date of the letter he had no money in the bank, but he afterwards deposited several sums which were in that bank at his death. The Lord Ordinary found, that the executor was liable to pay any legacy, however informal; but then, as he desired the legacy to be paid out of 100*l.* which he had lying in the Kirkaldy branch of the Glasgow bank, he conceived that it could not be carried into effect. The Court however unanimously altered that decision, and gave effect to the legacy. As that case occurred in the First Division, I have not read the papers, and I do not know whether the writing, constituting the legacy, was probative or not. But no part of the argument, as reported, turns upon that. On the contrary, the Lord Ordinary found, that any writing, however informal, was binding on the trustee. The question, in the present case, is this, whether this letter was not executed simul et semel; whether it was not pars ejusdem negotii? and whether this person, who had no rights whatever, but under the testament, could take the whole 6,000*l.* or 7,000*l.*, without implementing the positive condition which was attached to it?"

Oct. 18, 1831. was not intended as the only mode by which the legacies should be declared. The respondent, therefore, cannot challenge this exercise of the power, without approbating and reprobating the will of the deceased. Further, the will and the letter do truly import, not merely a power to declare legacies at a period future to the execution of the will, but an instant constitution of legacy. The obligation is constituted by the will, which is a regularly tested deed; and reference is made, by certain clear distinctive marks, to a letter which, from the terms of the will, must necessarily have been already prepared, and which it is offered to be proved was executed unico contextu with it. This was intended, not to constitute, but only to specify the measure of the obligation. To the complete specification of a legacy, however, it is not essential that either the name of the person or the sum should appear within the tested deed itself. If there be any certain means provided in it for ascertaining the measure of the legacy, it is competent to expiscate this by extrinsic evidence. Thus a legacy is good to a person who shall hold a certain office at the testator's death, or of a sum which shall at that period be at the testator's credit in a certain bank; or, what is very common in the wills of persons of rank, where neither the persons nor the sums are specified, viz. a declaration by the testator that all persons who shall be in his service at his death shall receive a term's wages. In all these cases proof prout de jure is received to establish that these persons were those intended, and that the balance in the bank books, or the wages, were of a certain amount, or who the servants were. So, also, if legacies be left by reference to the will of another party, they would be valid, though neither the names of the legatees nor the sums bequeathed were mentioned in the testator's will: and the third party's testament would be received as evidence of what the will truly was, although, quoad the testator, the third party's will is not tested. On the same principle, diligence for large sums of money has been sustained under cash credit bonds, which provide that the amount due shall be ascertained by a certificate of the cashier of the bank, although in no respect a probative writing. The will of a testator, therefore, may be sufficiently declared in a probative deed by a reference for the measure of it to a separate writing, which, if it can be established to be the writing referred to, does not require the formalities of the act 1681 as a solemnity. It comes thus

Oct. 18, 1831.

to be a mere question of identification, which may be established *prout de jure*; and if the circumstances already made out in this case do not prove the identity of the letter founded on with that referred to in the will, proof of the circumstances averred in the condescendence ought to be allowed,—parole proof to supply defects in a will having been permitted, in much less favourable circumstances, in the cases of Pollock, and of Norvel v. Ramsay. The case of Dundas v. Lowis, mainly founded on by the respondent, differs from the present in two important particulars. In that case the power to give additional instructions, was made in order to provide for a change of will, whereas here there is an instant declaration of will, and the letter is referred to merely as containing the specification of that will; and the testator, in the case of Lowis, reserved power to give additional instructions “by a writing under my hand;” a technical phrase, held to imply a writing probative in law; while here the writing referred to is described as a “letter” which is never tested, and is “signed,”—which expression implies a dispensation with the letter being even holograph.

Respondent.—A testator cannot reserve a power, contrary to the statutory law, of leaving legacies by an improbativè deed. Indeed there are no legal means of identifying a writing of importance, such as a letter bestowing legacies of the amount here in question, except by observing the solemnities of the act 1681. Besides, the reservation to appoint legacies in a letter “signed” by the testator must be construed as accordant with law, and as meaning a letter duly signed; and so the rule of approbate and reprobate does not apply, as the testator left no letter signed in terms of law. Neither do the terms of the testament, according to their true construction, import an instant declaration of will, as if the mind of the testator had been then fully made up; it merely provides for the declaration of a will to be formed at a future period, though within the same day. It is incompetent, and would be attended with the most dangerous consequences, if writings imposing burdens on executors were allowed to be reared up by parole, or by any proof except that provided by the statute 1681. The case of Dundas v. Lowis clearly rules the present. In that case, as in the present, there was merely a power to declare a future will; and on the same principles on which the words “a

Oct. 18, 1831. “writing under my hand” were construed to mean a probative writing under my hand, so must a “letter signed by me” be held to mean a letter duly signed according to the forms of law.

LORD WYNFORD.—My Lords, when your Lordships perceive that the judges in the Court below, whose minds are constantly engaged in the consideration of Scotch law, differed in opinion upon this case, you will not expect that I should be immediately prepared to deliver an instant opinion upon that on which they have doubted. This is a case certainly also, in itself and in its consequences, of importance. The point will ultimately come, in the first instance, to this—whether or not, though an instrument cannot stand as a probative will, as a will per se, it can receive that kind of support from another instrument which is duly executed, to give it the effect contended on the part of the appellants. My Lords, as the decision on this question may tend to the establishment of principles of great importance in other cases, and it is fit also to look into those decisions to which we have been referred in the Scotch law, I should move your Lordships that the further consideration of this case be adjourned.

EARL OF ELDON.—My Lords, the nature and importance of the case, as well as the fact of the difference of opinion among the judges in the Court below, makes it, in my judgment, extremely fit that we should concur in the motion which has been submitted to your Lordships, that this judgment should be postponed. One or two circumstances I will just mention, for the purpose of throwing them out of the case. In the first place some suspicion of fraud has been stated at the bar, with respect to the conduct of one of those persons, who is mentioned in the second paper as a legatee. I throw that entirely out of the question; because, unless I mistake the nature of the proceedings, no such question can be said fairly to be before us; it is not properly brought before us. With respect to another question, my Lords—I mean, what is the effect of this paper with respect to the executor taking the whole of those sums which are called legacies and bequests? It does not appear to me that we can now decide what the effect is of making a person sole executor and intromitter, where there is afterwards an express bequest to that sole executor and intromitter of so much of the property as he is required to pay in discharge of other sums intended to be given. That, I think, is not a question now before us, according to the form in which this case is presented to us. All that I wish to state upon those two questions is, that I can at present give no opinion upon either of them. But the question, whether this paper, by reason of the reference to it, is a paper which can or cannot be claimed upon by these legatees, is a point on which I shall be able fully to deliver my opinion when this case is resumed.

Oct. 18, 1831.

The case was then adjourned.

LORD WYNFORD.—This case comes before your Lordships by appeal from a decision of the Court of Session in Scotland. A noble and learned friend of mine, who for many years assisted in the decision of Scots appeals, was present when this case was argued, and concurs with me in the judgment I shall recommend your Lordships to pronounce. The questions for your Lordships to decide will be, whether, although a paper be not by the law of Scotland *per se* probative if it be referred to by a will regularly proved, and that will declares that the person to whom the will, in the first place, entrusts her property, shall dispose of it in the manner directed by that paper, such paper is not to be received to ascertain the trusts on which the estate is given; and whether the person who takes under the will is not bound to execute the trusts so ascertained. Your Lordships will perceive, that if such a paper cannot, under these circumstances, be received in evidence, and have the effect of directing the distribution of a deceased's estate, the intention of such deceased must be defeated; and a person who is only a trustee for others may take the whole beneficial interest to himself, to the prejudice of those for whom the deceased intended it. Your Lordships will find that such will be the case in the present instance, with regard to a very considerable part of the property of the testatrix. This may be hard: it may be unjust; but if it be according to the law of Scotland, I would not advise your Lordships, sitting judicially for the purpose of doing what you may consider justice, to decide against the law. But I have great satisfaction in saying, that, although the Court below determined that such was the law of Scotland, that Court was not unanimous. One very learned judge (Lord Alloway) differed with his brethren; and so far from this decision under appeal being in accordance with any settled rule of law, the balance of authority is against it.

A Mrs. Matheson by her will, regularly attested according to the law of Scotland, gave all her property to the respondent, to which bequest those words were added: "Subject always to the payment of such bequests as I may instruct him to pay, in a letter signed by me, of this date (that is, the date of her will,) to the several persons therein named, which bequests or legacies I expressly will and declare are a real and effectual burden upon my executry funds: second, I declare that after these several persons therein named have been paid and discharged their several legacies, the whole residue shall belong exclusively to the said James Harper." Your Lordships perceive that the respondent's share of her property is not to become vested until after the payment of those legacies.

Oct. 18, 1831. You can find nothing in the will to show what is the amount of the legacies given by it, or who were the objects of the testatrix's bounty. To ascertain those things you are referred to her letter, and without looking at that letter this will cannot be carried into execution. If I had found that I could not look at the letter, I should have been disposed to hold the will inoperative; I should rather have thought that the property should have been divided amongst the testatrix's kindred, than that it should be kept by a person who might not be beneficially entitled to one shilling of it, for the testatrix might have intended that all of it should be paid over by the respondent to other persons.

The appellant offered to prove that a letter of the date of the will was signed by the testatrix at the time that the will was executed, was then wrapped up in the will, was kept by the testatrix until her death, and was, at her death, found wrapped up in the will. This letter refers to the will, and directs the respondent to pay several legacies to different persons; and amongst those legacies, one of 1,000*l.* to the appellant. The Court of Session say, by their judgment, that this paper not being executed as a will, they cannot look at it; they reject the proof offered, and allow the respondent to keep the property bequeathed without performing any of the conditions upon which it was given to him.

If a paper, which is not *per se* probative, be referred to and effect given it by one that is so, why should it not be received and acted upon? The danger of acting on an improbative paper is removed by its genuineness being acknowledged by a probative one. The law which requires the attestation of wills is satisfied. The intention of a testator, which must, if that course be not taken, be defeated, is effectuated, and great injustice prevented.

The case relied on in the Court below is that of *Dundas v. Lewis*. Lord Alloway distinguished that case from the present. His Lordship says, in *Dundas v. Lewis* the trustees were to follow the directions given them by a "writing," and that writing, by the law of Scotland, meant a formal and probative writing. In this case the trustee is to follow the directions given by a "letter;" and that not one letter in a thousand is probative. I must observe to your Lordships that, in *Dundas v. Lewis*, the paper proving the legacy disputed was not written until some time after the making of the will; and that in the intermediate time the testatrix had given two legacies by a paper regularly attested. This confirms Lord Alloway's observations, and shows that by paper was meant a probative paper. The testatrix in the present case left no testamentary paper behind her but her will and the unattested letter.

But the case of *Dundas v. Lewis* is met by that of *Melvin v. Nicol*. A settlement was made in favour of a daughter, on the condition of

paying such legacies as the settlor had bequeathed, or might thereafter bequeath, by any writing under his hand, however informal. The Court decreed the payment of a legacy contained in a holograph letter of the testator. The principle established by that decision is, that a regular instrument gives effect to one that is irregular; so, in the present case, the probative will gives effect to the improbativè letter. I cannot, on principle, distinguish this case from that now under your Lordships consideration. I therefore humbly submit to your Lordships, that the Court below should have received the evidence offered. How far that evidence will satisfy a jury that this is the paper referred to by the will is another question. With respect to one of the legacies, there are circumstances that a jury will look at with great jealousy: I allude to that which is given to the person who wrote the letter. In England, a jury would require cogent evidence before they would affirm a legacy given to the framer of a will. But this is not the case now before your Lordships. I advise your Lordships to reverse the interlocutors complained of, and remit this case with directions to submit it to a jury. Oct. 18, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed: And it is further ordered, That the case be remitted back to the Lords of Session of the Second Division in Scotland, with directions to submit to a jury to consider whether the letter bearing date, “Edinburgh, 15th May 1826,” and purporting to be a letter from Margaret Matheson to James Harper, Esq., and by which the said James Harper is directed to pay to William Inglis, Esquire, W. S., or his heirs, 1,000*l.* sterling, was signed by Margaret Matheson on that day, and is the letter referred to by the will of Margaret Matheson.

MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

No. 61. JOHN MACKENZIE'S TRUSTEES, Appellants.—*Knight.*

ALEXANDER MACKENZIE'S TRUSTEES, Respondents.—
Rutherford.

Partnership—Interest.—Three separate contracts having been entered into by copartners in the course of five years: Held, 1. That the last contract was to be explained by the first; but observed, that a recital in a deed is not operative, unless for the purpose of explaining what is doubtful; that under the contracts one of the partners was entitled to a share of profits against his copartners personally, and not merely out of the reversion of the company estate, and that he was not liable in loss in a question with his copartners. 2. That accumulation of interest at the date of the action and of the decree not allowed, in respect of mora.

Oct. 16, 1831.

ROBERT SHARP and John Mackenzie were extensive merchants in Glasgow, trading under the firm of Sharp and Mackenzie, and had different establishments abroad. The business at home was conducted principally by Alexander Mackenzie; and on 9th September 1794 a contract of copartnery was entered into, whereby it was declared, that Alexander Mackenzie was to receive one fourteenth share of the profits, besides a salary of 100*l.* yearly; and by another contract, dated 27th November 1798, his share was raised to one eighth. Balance sheets had been docqueted in 1795, 1796, 1797, 1798, and 1799. Sharp and Mackenzie's affairs became embarrassed, and their estates were sequestrated on the 8th November 1799. A great deal of their property was situated in America, and Alexander Mackenzie was prevailed upon to go out to take the management of the affairs there. As an inducement to undertake this duty, an agreement was entered into, 6th December 1799, by Sharp and Mackenzie, which bound themselves to make payment to Alexander Mackenzie and his heirs of his yearly salary of 100*l.*, together with a share of the free profits of the trade, as the same should appear from the yearly balances made out since 1st September 1794, with interest from the date of such balances, and that so soon as they were in possession of funds or property to enable them to do so in whole or in part. Before leaving this country, Alexander Mackenzie granted a factory and commission to William Leckie and others for the purpose of carrying into effect this obligation.

While Alexander Mackenzie was in America, several instalments were paid to the creditors, amounting in all to 14s. per pound on the amount of their debts. In the year 1801 John Mackenzie, in order to put an end to the sequestration, and to have the affairs of the company speedily wound up, proposed to the creditors to pay the remaining instalment of 6s. out of his own funds, in full of the principal of their debt, on condition of their relinquishing all claims for interest. This was agreed to; but before proceeding to carry this proposal into effect, John Mackenzie applied to the attornies of Alexander to restrict his claim to the reversion of the company estate, and to relinquish all claim for interest upon his share of the profits, in respect of the obligation which John Mackenzie had come under to the creditors. The attornies having considered the proposition reasonable, and the arrangement advantageous for their constituent, a deed of agreement was entered into on 25th September 1810, whereby it was agreed to restrict Alexander Mackenzie's claim in manner before mentioned—that the books should be balanced by John Mackenzie at 1st July 1804—that Alexander's claim for interest should be relinquished—and that his share of the funds should be paid to him by bills at six, nine, and twelve months from the above period. On the same day, John Mackenzie wrote to Alexander, who was then in America, referring to the proposed arrangement for recal of the sequestration, but without mentioning any thing about the deed which had been executed, and adding:—

Oct. 15, 1831.

“ I would stipulate for you if your claims are preferable, and
“ it would so turn out that, after winding up the business, no
“ more than your amount is saved, that the same be equally
“ divided betwixt you and I, unless it shall appear I have fully
“ as much as you; but this I will not ask if there be a sum left
“ for me equal to what you are entitled to. You may at first
“ view think this as encroaching on you; a moment's reflection
“ will point out how great a gainer you become by our snatching,
“ with much labour and difficulty, the effects from under a de-
“ structive sequestration, by which not only 15,000*l.* of interest
“ will be saved to the estate, but also a larger sum in commis-
“ sion, besides all the load of charges natural to a sequestration.
“ To wind up such an estate as ours, if continued under a
“ ruinous sequestration, your expectations and mine of a surplus

Oct. 15, 1831. " would certainly be blasted ; for not only every shilling of interest would be charged us, but also a full commission to the last moiety paid, as well as other heavy charges incurred. It is certainly, then, your interest to go into my views to save your own property. Indeed, it is the opinion of Mr. A. Graham (the trustee), Messrs. Strang, Leckie, and Mathie (the attorneys) ; but as I will on no account undertake such a burden, unless you are of my mind, I must have it immediately under your own hand ; and unless you write several copies by different conveyances, your letter may be too late, and the day appointed upon which I am to give in my determination past, and our affairs continue irrevocably under sequestration ; but there is such a fairness in the proposition, that I think you will certainly agree. I wait, therefore, with impatience for your reply."

Alexander Mackenzie returned an answer to the letter on 4th December 1801, in which he observed :—

" As to the request you make of my agreeing to give up one half of my property in your favour, is what I cannot imagine you to be serious in. I suppose that you have not forgot, that, by our contract of copartnership, I had the full right to draw out of the company's funds my proportion of profits yearly, and, to have followed the example that was set before me, secured the same to my family ; and if this had been done, would you ever have thought of asking me for any part thereof."—
 " As to what you say of Mr. Graham and the other gentlemen being of the same opinion with yourself, however far this may be the case, or for as much as I would revere the counsel of these gentlemen, you must excuse me, in the present instance, for reserving to myself the power of thinking and acting as appears to me to be proper. I will come under no promise nor engagement in my present situation, but will most heartily join you in realising as much as possible of our late concerns, and as speedily, too, as the nature of the business will permit, and that upon the same terms which I agreed with you and the gentlemen in management of the business before I left home."

The same sentiments were communicated in a letter which Alexander Mackenzie wrote to Mr. Graham on 13th June 1802:—

" Mr. William Leckie has written to me, that, at the sollicita-

“ tion of Mr. John Mackenzie, he at
 “ signed a deed on my account to g
 “ that I do not exactly know the m
 “ know that these gentlemen had no
 “ my claim upon my former partner
 “ any thing of the kind.”

Notwithstanding of Alexander's re
 proposed, John Mackenzie carried
 with the creditors, and on 11th May
 was recalled. Shortly after this Ale
 his way home from America, having
 deed and settlement, whereby Mr. Le
 in this country were appointed his
 persons therein named.

In 1810 the trustees raised an ac
 of Glasgow against Sharp and Mack
 John Mackenzie, and the represent
 payment of 10,000*l.*, or such other
 for Alexander Mackenzie's yearly s
 the profits of the business. The tr
 raised a counter action before the Co
 Alexander Mackenzie's share of the
 pany's transactions, and for payment
 in America. The original action wa
 Session, and conjoined with the action
 of procedure, Lord Bannatyne, Ord
 to the Court, who, 2d February 1821
 tor, finding,—

“ That the claim made for the tru
 “ Mackenzie is well founded,” and
 “ Ordinary to ascertain the balance d
 “ to decern for payment of the same
 “ the parties as to the demand for a
 “ ment to account of such balance ;
 “ at the instance of John Mackenzi
 “ kenzie's trustees, assoilzie the said tr
 “ of the same, and decern : Find the
 “ der Mackenzie entitled to their ex
 “ the said conjoined processes.”

On 11th July 1821 this judgment

Oct. 15, 1831. after a remit was made to Mr. Brown, accountant, to examine the books and accounts of the companies, and to report. A report was lodged, to which both parties objected.

The trustees of John Mackenzie pleaded, that under the contracts of 1794 and 1798, there was no exemption of Alexander Mackenzie from liability for loss; that, at all events, he was to be relieved only from loss of capital; that, by the deed of 1799, he had no claim against the parties personally; that there being no reversion of the company's estate, his representatives could draw nothing.

Alexander Mackenzie's trustees pleaded, 1. That the report was erroneous, because it bore that the docquetted balance sheets for the years 1795, 1796, 1797, and 1798, were not intended or fitted to ascertain the precise sums due to Alexander Mackenzie, whereas it was clear that those balance sheets were so fitted and intended, and were docquetted for no other purpose than to fix the precise sums. 2. That it was reported that the estimated amount of a share of certain alleged losses appearing as funds for 1798 ought to be deducted, whereas there ought to be no such deduction, because there had previously been made specially all deductions applicable. 3. That, while the report bore that it would be equitable to allow an accumulation of interests as at 8th October 1810, the date of the action, to 2d February 1821, the date of the decree, there ought to be no such allowance by reason of alleged mora on the part of the objectors, whereas it was established that there had been no mora. 4. And that it was reported, without evidence, that there ought to be deducted certain payments alleged to have been made to Alexander Mackenzie in 1799.

Cases were ordered, and after some other proceedings the Lord Ordinary, on 25th May 1830, pronounced this interlocutor :—

“ Having heard parties' procurators, approves of the accountant's reports, and decerns and ordains the defenders, conjunctly and severally, viz. John Mackenzie's trustees, quæ trustees, and the trustees or representatives of Robert Sharp, to make payment to the pursuers, Mrs. Marion Kelly or Mackenzie, relict of the deceased Alexander Mackenzie, merchant in Glasgow, William Leckie, merchant in Glasgow, and Benjamin Mathie, writer there, as surviving trust dis-

“ ponees of the said Alexander Mac
 “ 2s. 2½d. sterling, and the legal
 “ thereof, from Martinmas 1828 til
 “ decreet to go out and be extracted
 “ due to neither party since Februar
 “ remits to Mr. James Brown, accou
 “ and accounts of Andrew Duncan
 “ to call therefor, and for all docun
 “ he may deem necessary, and to rep
 “ with reference thereto.”

John Mackenzie's trustees reclaim
 or at least that it should be found pr
 for any sum until the investigation
 Duncan and Co. should be brought

The Court pronounced this interloc
 “ found by the pursuers, as trustees,
 “ for the consequences that may a
 “ the accounting with Andrew Du
 “ to the interlocutor reclaimed again
 “ interim to be extracted, on securi
 “ and lodged in the clerk's hands;
 “ fenders liable in the expenses in
 “ the date of the Lord Ordinary's in
 “ appoint an account thereof to be
 “ auditor to tax and report on.”*

Both parties appealed.

John Mackenzie's trustees. — Ale
 exemption from liability for loss;
 have no claim for profits against the
 if these profits, before they were dr
 they remained mixed up with the com
 by subsequent losses, and the ultimat
 There is no evidence that under the
 Alexander Mackenzie was relieved
 partners from all liability for loss.

Oct. 15, 1831. which his share, subsequent to its date, was enlarged from one fourteenth to one eighth of the profits, contains no provision or declaration that he was absolutely to be relieved from loss, nor is there any thing to establish his exemption from liability for loss, as under that contract. At all events, under these contracts, and according to their just and true construction, Alexander Mackenzie, at the utmost, was only exempt from liability for actual loss, but had no right to profits, either, in the first place, where no free profits were made in any one year, after deducting the whole losses by bad debts or otherwise during that year ; or, in the second place, where the free profits made during any one year had been absorbed by subsequent losses, and in this case, by the ultimate bankruptcy of the copartnery, before such profits were drawn out and appropriated by the copartners, and while they remained undistinguished from and mixed up with the general funds.

Independently of this, and according to the true construction of the contract of 1799, by which the interests of the parties were ultimately arranged, and having regard to the circumstances in which it was executed, and to the prior contracts, Alexander Mackenzie had no right to profits, except from the reversion of the copartnery estate, after satisfaction of all the company's debts and obligations,—the object of the contract 1799 being to confer upon him a preferable right over the company funds only, as in competition with the copartners, but not to create any claim against their separate or individual estates ; and, therefore, as there is no reversion of the copartnery estate, the whole being swept away by the bankruptcy, there is no fund against which Alexander Mackenzie's representatives can have any claim under the contract 1799.

But although these deeds are conclusive against the claim, the agreement executed between Alexander Mackenzie's attornies and Messrs. Sharp and Mackenzie superseded all the previous arrangements, and under it the accounts between the parties must be adjusted, unless it can be shown that it is not binding or effectual as against Alexander Mackenzie.

But upon the supposition that the interlocutors of the Lord Ordinary and of the Court, together with the report of the accountant on which they are founded, should be supported, it is

plain, with reference to the cross and the respondents to the accountant's account, which, being sufficiently in their favour, are altogether sufficient.

Alexander Mackenzie's trustees.—The decree of the 17th and 1798 Alexander Mackenzie was given upon the ground that, from loss either of capital or profit, and upon the existence or non-existence of an obligation of 6th December 1799, the respondents, in signing deed, because the agreement was restricted, was ultra vires and that Mackenzie had a claim for profits against the respondents, and such claim was not dependent on the reversion of the company estate. The respondents, for the years 1795-96-97 and 1798, were ordered to ascertain, and did ascertain, the profits of the company. Mackenzie. Interim-decree in favour of the respondents to have been awarded upon these documents, assuming that the docquetted balance was held as conclusive, there ought not to have been an estimated amount of a share of losses appearing as funds in the docquetted balance, if these had been previously made specific.

Accumulation of interest on the debt (the date of the action,) and 2d February 1800 decree,) has not been allowed by the respondents, whereas there was no mora.

LORD CHANCELLOR.—My Lords, this case, before your Lordships appeared to be in a state of security than, upon a more attentive consideration of the perusal of these very voluminous papers, it can be no doubt, that if in any instrument, or any other instrument, the parties were bound in another instrument certain things were to be done, or bound to be performed on the other instrument, being had to that other instrument, the way of recital, into the one in question, it is not necessary that the instrument does not contain this matter, the respondents are absolutely for nothing, because a man is not bound to recite the matter of recital. You are to look upon the deed. The recital is of importance, and is

Oct. 15, 1831. ing what is obscure in the operative part, or in extension of what is limited in amount in the operative part. For these purposes the recital is material, and is evidence of the intention of the parties; but it shall not control the intention, plainly and unequivocally expressed by the parties in the operative part of the deed, that being the part by which they are to be bound. Now, I take it to be clear, that it being found in one part of the deed of 1799 (the last of all) that there is a statement referring to what had passed before, (and that is the important point at issue between the parties,) that Alexander Mackenzie was to receive a certain share of the free profits, after deducting the expenses and bad debts; the dispute being, whether he was entitled to receive his share of free profits, an eighth and 100l. a year, at all events; and if there were no free profits, he was to be subject to no loss—that he was to be a partner to receive profit, if profit was made, in a certain proportion, but no partner to share in any loss? The first question is, whether this is to be taken as the operative part of the deed in 1799, and to have relation back to the period that had passed before, or only as a reference in the recital to the former deed? Now, in looking into that, I have no doubt whatever—and here I agree with the counsel for the appellants, and differ widely from the counsel for the respondents—that this is to be taken as a recital. I have stated that a recital is not operative, unless for the purpose of explaining what is doubtful; but it is not operative to explain the meaning of the parties in a former instrument, if that former instrument is clear in itself. It may operate to explain, and, which is very material in this case, to prove the substance of a lost deed, and to prove important matters, of which other and more precise evidence is not forthcoming. But where there is another instrument executed by the same parties, referred to in the recital, by which they affix a meaning to it, it cannot be said to give a meaning to the former deed which that former deed does not, upon the production itself, appear to have; and your Lordships know, so far have the courts of law gone with respect to disallowing any alteration of the meaning being drawn from a matter of recital, that they have not even allowed, which has been thought to be going far, the legislature in the preamble of one act to affix a meaning to another; holding, that if the legislature intended to affix a meaning to what it had passed, this ought to be done by a declaratory act. Now, according to these principles, I cannot regard this recital, as either evidencing the intention of the parties in the deed of 1799, if that intention is clear without it, or as giving a meaning to the deed of 1798, or the one immediately preceding, which deed enlarged, as it were, the terms of the last preceding deed of 1794. When you look into the deed of 1798, which is forthcoming, you do not find any thing in it to warrant the recital in the deed of 1799.

Oct. 15, 1831.

namely, that those were the precise terms upon which Alexander Mackenzie was to receive his share. On the other hand, it must be admitted you do not find any thing that is inconsistent with or repugnant to the notion that those were the terms—the deed is consistent with those being the terms. So that, though a recital would carry the meaning of the parties further than they had expressed it, yet it would not control or set aside any thing they had purported to have done; but I cannot go so far as to say that the mere recital of their intention referring to the deed of 1798, or being in the deed of 1798, or being in the deed of 1799, is sufficient of itself to import into that prior deed of 1798 a condition which the parties seemed to have assumed, or, as it is argued, that it is to be assumed to have existed in 1798. I cannot go quite so far with the counsel for the respondents. I think it would be dangerous, and tend to confusion in the construction of written instruments. The safe rule is, to hold the parties only bound by what they have, in the operative part of the instrument, bound themselves to perform. But then there is another view material in the present case, and it is upon this view that the Court below must have decided. I am furnished with a most imperfect note, professing to contain the grounds of the decision; but the Court appear to consider, that besides the deed of 1799, dealing with the other deed of 1798, there was an original bargain in 1794 not forthcoming, and that that original bargain is apparently, by the deed of 1798, only continued and extended; and that, taking (and I am prepared to advise your Lordships to sanction this ground) the deed of 1799 as evidence that the parties contracted in 1794, you have a right to take it as evidence of the nature of that contract—that you have a right to take that deed as evidence, and that the acting under it is evidence of the original bargain between the parties, that Mr. Mackenzie was to be paid 100*l.* a year and a fourteenth of the free profits, (afterwards extended to an eighth,) and that he was not to be subject to any loss. It is true that the deed of 1798 does not expressly exempt him from any loss; but if in 1794, in the original concoction of the bargain—in the inception of their relation—there is reason to believe he was to be exempted from loss, there is nothing in the deed of 1798 that is not perfectly compatible and consistent with it. On the contrary, the more your Lordships look at the whole of the relation that appears to have subsisted between these parties, the more you will be disposed to think that he was to be protected against loss. He was not in the nature of a partner, properly speaking, not one of the firm itself; and though he was to be paid partly in profits and partly in salary, it was only to give him an interest in the success of the concern. He was rather bringing in work and labour as an agent than science and capital as a partner. He is to be paid 100*l.* a year salary, a

Oct. 15, 1831. moderate salary, he is expressly stated to be a person to render the benefit of his work, labour, and science, and he is to be paid a very small share of the profits. He is, by an explicit agreement, excluded from all property in the capital. What he did in going to America, and the labouring oar he took upon himself, is consistent with the rest of the case: for, taking the whole of the transaction, the probabilities are all one way, and it is likely, even if you saw no evidence of it, that such an arrangement should be made as to secure him from loss; because, if a person has a salary and a small proportion of the profit, and is not secured from loss, he fills a very inferior situation to those enjoying a good salary, and not paid by a proportion of the profits. That being the probability of the case, and it being plain that such was their intention at the time they so expressed themselves—that such was their knowledge—and that such was their belief at the time—what other conclusion follows from these facts than that the inference which I have stated cannot be wholly rejected from the cause? The recital is not to control the deed of 1794, but to show that the parties knew and believed that these were the terms and such the conditions upon which Alexander Mackenzie had acceded to, and continued in, and become a member of, and employed under the partnership; and such being the case, I am inclined to agree in the opinion of the Court below, that this must be taken to be the basis of the transaction between the parties. But then it is said afterwards there was a transaction in 1801, which, though ultra vires, yet must be held to be homologated, and set up by the party himself; because he did, at all events, acquiesce in it, and under it this attorney obtained a recall of the sequestration, of which Alexander Mackenzie did not object to taking the benefit. It is unnecessary for me to observe, that this was behind his back—the sequestration being recalled—he being in America at the time, and dead before any steps were taken to get rid of that recall or supersedeas, and to set up the sequestration again. The Court, after his death, had, or not, a right to recall the recall of the sequestration, and to set up the sequestration after his death. It is unnecessary for me to deal with that question; I can conceive a case in which the Court may be called upon to exercise that right, and I do not dispute that the Court may do so. But we are here upon a question as to the conduct of the trustees after the death of the bankrupt. His remaining in America, and his death there, accounts for his not taking any step; and his not having recalled the recall of the sequestration amounts to nothing. But it is said, the trustees were in his shoes, and representing him, and why did not they take steps? I will not say that they might not have done it—they had a right to set up the sequestration—any more than I will say that the Court might not, after his death, have set it up. But the

question being as to the homologation of the verdict, acting, it is sufficient to say that the verdict being dead at the time takes away from it in not so applying for the recall of the verdict to confirmation or homologation of which Mackenzie's absence, ultra vires. As to that it amounts to little or nothing. The only question any doubt is upon the subject of the verdict looking into the case a little farther, I am of opinion that the Lordships to affirm that judgment. I humbly move your Lordships that the verdict be affirmed; but in a case of this kind the Lordships to affirm it with costs.

The House of Lords ordered and the appellant complained of be affirmed.

JOHN MACQUEEN—SPOTTISWOODE and CO. PRINTERS

JAMES M'GAVIN, (Trustee for the
and Co.) Appellant

JAMES STEWART, Respondent

Appeal.—An order for the examination of three witnesses in respect of two of them being dead.

IN July 1830, (Vol. II. p. 536,) the Court of Session, in this case (which related to an account of the Court of Session, with a direction to the jury, and a recommendation that the witnesses be examined on oath before the jury.*

The agents for the parties now at the House, and being called to the bar, your Lordships, stated, that two of the parties to be examined upon oath, were dead.

* See 9 S. D. B. 17, ante procedure on a motion at the Court of Session.

Oct. 18, 1831.

LORD CHANCELLOR.—My Lords, there can be no doubt whatever as to the proper mode of proceeding in this case. When your Lordships made the order directing that the parties should be examined upon oath, your Lordships meant that they should both be examined, or neither. It would be unjust to examine one of them, without both being examined. But two of the parties intended to be examined are dead. This was a fact unknown at the time of your Lordships' order. I have conversed with my noble and learned friend who attended the hearing of the cause upon the subject, and know his opinion; and I will now move your Lordships that the clerk of the House do strike out the direction to examine the parties.

Ordered accordingly.

A P P E N D I X

OPINION of LORD BALGRAY in the LARTON (Ascog), reported as

LORD BALGRAY.—This is a case of Scotland. From the able assistance the bar, and particularly from the ben are now laid before us, it would appear any thing on this case ; however, as it is parties that they should know the groundment is founded, and as still some authorities it may be proper to point these out, principles it is humbly thought that ought to be founded.

From some observations made on the necessary to consider, in the first place, the entail of Ascog on which the is founded. The terms of the provision, the prohibitory clause, are as follow :

“ tailzie have any power or liberty to
“ lands and others foresaid, or any part

I have thought it necessary to compare the clauses in deeds of entail which we find in those who were well acquainted with Scotland. I have compared it with the entail of the dukedom of Rothes, which is
“ it shall be no ways leisome or law
“ annalzie, dispoone, dilapidate, or put
“ estate, or any part or portion thereof

This deed of entail was prepared by the first and the most laborious compiler of the laws of Scotland, and who tells us, that he has bestowed common pains and attention. This deed is

I have also compared this clause with the Rosehall entail, dated 4th June 1681, by Sir George Mackenzie, and which is founded on account of his being the person who

The restraining clause in that entail is as follows: " That it shall in
 " no wise be leisome to the said George M'Kenzie, my son, nor to
 " any other of the heirs of tailzie and provision above expressed,
 " to sell, alienate, or dispone the lands, barony, and others above
 " rehearsed, or to grant wadsets or infestments of annual rent, &c.;
 " neither shall it be lawful for them to contract debt, &c.

" That the lands, &c. shall not be affected therewith in prejudice
 " of the heirs of tailzie, seeing these presents are granted sub
 " modo."

I have also looked into entails of later times, prepared by the most eminent conveyancers, and I find that the style that they have adopted is pretty similar to one another, and it will be found very nearly to be the same with that which appears in the system of styles which has been given to the public by the members of the Writers to the Signet. The restraining clause there recommended is thus expressed: " That it shall not be lawful to nor in the power
 " of the heirs male of my body, or any of the heirs of tailzie and
 " substitutes above written, to sell, alienate, dispone, burden, dilapi-
 " date, or put away the lands and others, or any part thereof," &c.

From comparing the clause in the entail of Ascog, under consideration, with those which have been noticed, and indeed with almost every entail which has been brought under discussion, it appears to be perfectly clear that the present restraining or limiting clause is in perfect conformity to the law and practice of Scotland.

Supposing this clause to be according to legal form, the question still remains, what are its effects? Does it constitute any obligation, and so create any corresponding and relative right? If there is no obligation constituted, then it would be obviously unnecessary to enter upon any further discussion; if, on the other hand, there is an obligation, and some relative right thereby created, it becomes matter of investigation what that obligation is,—what is its extent and nature?

To maintain that no obligation whatever is created by such a clause can only proceed on one or other of two grounds; either that the words that have been made use of by the granter of the deed are incapable of creating any obligation in consequence of their not being agreeable to the form adopted in the law; or that a prohibition annexed to an appointment or substitution of heirs of entail, and declared to be a condition of the settlement, if not accompanied with irritant and resolute clauses, never can create an obligation.

With respect to the first this appears not to be founded in fact, because almost in every entail which has in practice been allowed to be completely effectual, the clause is expressed nearly in similar terms, and of course it is quite vain to argue that the present clause

OPINION OF LORD BALGRAY

is not according to the forms of the law on the other ground, that a prohibition on the heirs of entail creates no obligation, — the first principles of law, because, on original principles, law is nothing but prohibitions and restraints on men with respect to their own conduct. On original principles, there are, in fact, but two original principles. All the rest are composed of nothing but prohibitions. It is not possible to dispute but that these prohibitions are, or, “Thou shalt not commit murder,” or, “Thou shalt not commit adultery,” or, therefore, unless the contrary should be proved, it is nugatory to contend that a prohibition on the heirs of entail, the granter, having competent authority, creates no obligation to all his heirs and representatives.

It is very true, that in the present case there is an express obligation, but from the nature of the obligation it takes place but where the granter or entailer obliges himself, which happens either in mutual entails; but in all other cases an entail cannot commence with the institution of the granter. On the great majority of entails, no direct obligation can exist.

The origin of the obligation, which appears to depend on the simplest and most obvious principles.

It may be observed, generally, that the owner of the land, *disponendi de re et ejus fructibus* is absolute. He has the right and the power to dispose of the land and its fruits, and to impose restraints and limitations he thinks fit, subject to the control, *nisi lex obstat*. We consider that every proprietor must be obeyed by all his subjects as if he were a lawgiver.

This has always been the doctrine of the law from the earliest times; this Court has carried it into effect from the earliest period effect was given to general but not merely as against heirs and representatives and successors; and the reason for giving them the same effect Mr. Erskine expresses it, “in consequence of the power given to all proprietors of disposing of their lands and tenements, and of imposing restraints and limitations as they shall judge fit.”

This was not corrected till the case of *Macdonald v. Macdonald* decided July 1784. (Ib.)

There can be no doubt, therefore, that the law is the same in Scotland.

The only question, therefore, which can remain, is, whether the law is different when applied to a deed of entail? Has a proprietor, in executing this deed, less power over his representatives than in any other deed?

When we examine a deed of entail it may be truly said, that the dispositive and prohibitory clauses form its very essence. These are the clauses which properly constitute that deed. The first form of entail contained no other clauses. All the other clauses are intended for no other end or purpose than to give efficacy to the will and intention of the granter, which are contained in those two clauses. The irritant and resolute clauses, of which we hear so much, can contain no obligation whatever; they are merely invented for the purpose of enforcing the dispositive and restraining clauses, and containing a punishment on the receiver of the gift if he contravenes the intention of the granter. Those clauses may be expressed in a single line, and probably it is the best mode of so expressing them, to avoid all future dispute and controversy.

Some very unaccountable and strange misapprehension seems to arise in the minds of some persons regarding the deed of entail. It seems to be viewed as a confused, perplexed, anomalous, and modern contrivance; whereas the slightest consideration may teach any one that no deed can be simpler in its form and constitution. It is nothing but a simple disposition, with limitations and provisions, and these made effectual by defined penalties. There hardly exists a common feu disposition which does not prefer some heirs to others, and which does not contain some limitations or provisions of some kind or other. A deed of entail may contain a more prospective series of heirs, or more numerous limitations, according to the will and inclination of the granter, but these, be they few or many, make no change on the form or kind of the deed. The irritant and resolute clauses are nothing but simple penalties on contravention, assented to by the parties. No *verba solennia* of any kind are required.

As by the law of Scotland the heir of entail is *dominus* or *fiar*, it is the prohibitory clause which is intended to restrain him in the exercise of those rights which would otherwise be competent to him as the *fiar*. When such restraints are imposed, the obligation to attend to them appears to be founded on the plainest principles of law, and even upon common justice. It is founded upon a *quasi* contract between giver and receiver.

It is admitted by the pursuer, and indeed must be admitted by every lawyer, that every granter by the law of Scotland may bestow his property in any manner he pleases; there is no person who can control him, except the general law: but it is plain that no person

who does represent him can possibly
tion.

On the other hand, the grantee, dis-
ever name he may be called, has a
maintain that he will accept of any
whatever restraint, condition, or obliga-
heirs or representatives, from the very
have no power to control him. The
declaration on the part of the recei-
restraints and limitations imposed o-
receiving of the right is tantamount to
declaring, that although he gets the
understood as being under such condit-

This would no doubt create a direc-
still this would not be agreeable to the
Scotland, because the grantee of suc-
personal, as the receiver under such c-
to create any burden on the property.

When, however, it is contained in
granter himself, then the quality appe-
and is comprehended in the procurat-
into the infeftment, and so is promul-
obligation which is constituted against
the same kind and nature as if he had
a relative deed and obligation.

This has always been the view whic-
obligation, for, in the older decisions of
it will be found that our lawyers mak-
when the receiver disregards the resti-
to contravene the warrandice of the de-
pro forma, he has executed no deed w-
what has been given to him ; it is, th-
obligation which is created in this ca-
own deliberate act and consent.

This same deliberate consent is
operative effect of the irritant and r-
may consent to what punishment he
contravening the obligation under wh-
congenial to the law of Scotland ; fo-
relative either to real or personal right-
and this penalty, less or more, has al-
the Court.

The efficacy, therefore, of these claus-
ties, such as granter and grantee, is de-

consent. No person can doubt this as to the primary parties. But the very same thing may be said as to heirs and representatives. Every heir may repudiate or reject the inheritance which descends to him if he dislikes the conditions which burden it ; but if he is desirous to take possession, he must, agreeable to our forms, make a claim ; and that claim, to enable him to obtain possession, must be signed, either with his own hand, or, what is the same, by special mandate ; and that claim must contain a declaration and specification of all the burdens, limitations, and provisions contained in the original deed ; and the heir can only ask delivery of the property under such burdens, and must declare his willingness to submit to them.

This is more peculiarly our form with respect to the deed of entail than any other deed. In the special service it must be observed to the very letter ; and even, according to practice, in the general service it has been so observed, and the generality of practitioners do observe it at this day. The Court, at an early period, was also of this opinion, and they so decided this case, 1st February 1726, *Stewart against Denham*.* But this was properly reversed in the House of Lords, and, although it was so, yet still practitioners have adhered, though not necessary, to this practice.

In this way, the contract which is created between the original parties is renewed with every succeeding heir ; and this contract and agreement the law and legislature are bound in justice to enforce.

All this appears to be extremely plain when the matter is confined to the original parties and their heirs ; but when the operation of this obligation comes to affect third parties, different principles of law emerge and come then into operation, for whatever contracts the parties may have entered into themselves, they have no right by such obligations to affect the rights of third parties.

For a long period, when the commerce of land, particularly in Scotland, was not very extensive, the limitations and provisions contained in the dispositions of land were not much felt ; but, in the progress of time, when land became the object of commerce, and when proprietors were under the necessity of disposing of their property, those limitations and restrictions came under consideration ; and it was long much doubted how far it was possible to sustain such provisions and obligations against third parties, particularly when it was acknowledged on all hands that the grantee or institute of the deed was the dominus or fiar of the property. Lawyers very soon saw the difficulties which occurred, and at first it was thought that third parties might be protected, and the will of the disponent at the same time carried into effect, by allowing of

* Mor. 7275.

OPINION OF LORD BALGRAY

interdiction, and afterwards of inhib those rights. With respect to the known in our law, it is obvious that it effect, because it could only be car persons who were in being at the tin under such an obligation. It could heirs.

Inhibition was afterwards thought o general principles it was the best r but still the remedy was very imper and could apply only to the deeds c such of these only as were subsequen

The difficulties in making the deed consistent with the general notions re to protect entails by contriving irritant have now made such a figure in this d of protecting the right, on strict reas able, because the right of the party the act and deed has been committe lawyers were of opinion that it was against the effect of obligations whicl parties.

It must be obvious, however, that different principles from those which the entailer and the substitutes, on th or disponee and his representatives on

This part of the case naturally lea progress of entailed settlements.

Entails in Scotland appear to proce

The first source of entails certainl which stimulates all men in wishing to they have acquired by their industry bodily. Such acquisitions, where a m be able to use them in this world, he ne either on his family or his kindred. appears to be sanctioned from the pr and has pervaded all countries; and th in the laws of all civilized nations from t the law of the twelve tables, adopted in " legasset super pecunias tutelæve s This principle has taken deep roo owing to our confined situation, a families and clans.

The second source of entails has been unquestionably partly derived, and certainly encouraged, from our adoption of the civil law. Entails have been derived from the Roman *fidei commissa*; and the *actio fidei commissaria* is very similar to the remedy adopted in our law. In fact, there are some texts in the civil law which demonstrate that the entail, as adopted in practice with us, was nearly the same among the Romans. It is also remarkable, that in the older entails the very prohibitory clause now in question seems to be borrowed almost verbatim from Lib. 7. Cod. 4. tit. 51. See also Nov. 189.

The third source of entails seems to be derived from the feudal law, for although the word "tallia" is not to be found in the early institutions of the feudal law, or in the practice following thereupon; yet it is very plain that the feudal demission, particularly to heirs male, and with a clause *de non alienando*, which was so customary, is nothing but an entail; and accordingly Craig, in his *Diegesis* on Tailzied Succession, most emphatically expresses himself, "*hujus talliati feudi prima origo repetenda est ex mente et sensu juris feudalis*," Lib. II. Dieg. 16. s. 1. It may be noticed, that the clause *de non alienando* was very common in our law, and was only taken away, upon compensation, by the Act 1748; and even at this very day it is effectual when it is coupled with the *jus Protime-sios*, as was found in the case of Sir Charles Preston against the creditors of the Earl Dundonald, 6th March 1805, and affirmed in the House of Lords.*

It is from those sources that our entails have arisen and been engrafted in the very nature and constitution of our law.

The history of entails is extremely well laid down by Craig in Lib. II. Dieg. 16, the whole of which title is well worthy of perusal; because, from it it is indubitably proved that those deeds are good and effectual according to the principles of our common law.

Lawyers have often noticed, and it has been done in the present case, that entails were considered, at a very early period, to be deeds of an odious nature; and reference is made to an expression of Craig's in the Dieg. alluded to, where he says, "*Nostro tamen jure talliæ odiosæ reputantur et strictissimam interpretationem recipient.*" He appears to have given them this appellation in order to draw the conclusion that they are *strictissimi juris*. But there was no occasion for his doing so, because, according to the principles of the common law of Scotland, all limitations and all restraints on property are *strictissimi juris*. Craig's opinion respecting entails was quite

* Mor. No. 2, Appendix. Pers. and Real.

the reverse of what is supposed to be the case from the expression alluded to; and, accordingly, his own opinion will be found in the end of the 13th section, and in the 14th of that Dieg.: “Itaque
 “ feuda talliata contra legem, sive regni, sive conscientiæ, qui putat,
 “ a vero meo judicio, longe abest: sed in his non statui immorari;
 “ nam tallias neque contra leges regni, neque conscientiæ esse,
 “ censuit senatus in causâ Laughlani Machlaughlan contra Dominum
 “ de Lawmound.

“ Hæc sunt quæ contra tallias et pro talliis solent adduci ab utrius-
 “ que partis patronis: Quod ad me attinet, nunquam committam, ut,
 “ in re tantâ, meam sententiam ulterius interponam quam ut illud
 “ tester, eum qui jus commune patriæ sequitur, legesque ipsas testes
 “ conscientiæ suæ habeat, meo judicio non errare. Talliarum autem
 “ jus, publico totius regni consensu receptum, non solum in maribus,
 “ sed etiam in fœminis, et ut Canonistæ volunt; *cæli cælorum domino,*
 “ *terram autem, et jura omnia quæ de terris et feudis habentur, dedit*
 “ *filiis hominum, ut liberè, si in potestate constituti sint, pro cujuscunque*
 “ *regni commodo de suis rebus possint disponere.”*

The case referred to by Craig is to be found in the Lord President Sir James Balfour’s Practicks, *voce* Tailzie: “Infestment of
 “ tailzie is leasum be the law of this realme, and the geving and
 “ making thair of is not understuid to be hurtfull to the kingis
 “ concience or saul; and thairfor ony speciall infestment of tailzie,
 “ geven to ony man be the king in his minoritie, cumis not under
 “ the generall revocation maid of tailzies gevin be him.” 1 Mart.
 1548, L. Maklaughlan contra the Laird of Lawmound, 2 t.
 c. 332.

Bankton also gives precisely the same account with Craig, as to the origin and progress of our entails there, by demonstrating that that deed is founded upon the ordinary practice and law of the country: B. II. Tit. 3. sec. 135.

The decisions of the Court from the earliest times are also complete evidence of the same proposition. On such a point it is needless to multiply authorities; but there are two which deserve attention. One of these is the case of Helen Sharp against Mr. John Sharp, 14th January 1631, collected by Durie, page 553.* This was the case of a mutual tailzie; but it is plain there is no difference in point of obligation between a mutual tailzie and any other common deed of tailzie, because the very disposing the estate to any individual under a specific condition or provision creates an onerous cause equally as if there was a mutual deed; and there appears no distinction between them. In that case, after a mutual

* Mor 4299.

tailzie had been executed, one of the parties sold part of the estates contained in the tailzie, which of course gave room for a claim, at the instance of the heirs of the other, for implement. "The Lords found the parties contractors cannot resale, but that the same contracts are obligatory against the parties, and cannot be broken by one of them, except both the parties consent mutually sicklike to the dissolving as they did joyntly together to the making and subscribing thereof."

At the same time, "The Lords found, that, in these cases, the contractors may sell and annalzie the lands at their pleasure, notwithstanding of the contract of tailzie; for this contract, or other like contracts, extends not to prejudge the parties or any of them in any liberty which they had before the contract, except only concerning the succession to their right, wherein they having agreed upon an election of their succession, and the manner thereof, that was not alterable by them, but by consent as said is."

This case, which is collected at considerable length, is deserving of perusal; and Lord Durie sums it up with this remarkable observation—"But it may be thought that by this liberty permitted to any of the parties to sell, they may elide the force of the contract *in toto*, by making alienations to a stranger, yet to the behove of another successor than that agreed upon in the tailzie; but if such fraud be intended, it is in law reparable."

These authorities are alone sufficient to show what was early thought to be the effect and nature of such prohibitory clauses.

In the progress of time, when entails were so often disappointed by the imprudence of the possessors, and so alienated to strangers, it became an early object with proprietors to devise means to secure them against third parties; and, as already stated, it was endeavoured to protect those restraining clauses by interdiction and inhibition, the inefficacy of which was soon discovered by lawyers: and accordingly, about the time of Sir Thomas Hope, irritant and resolute clauses were thought of for that purpose. At first, those clauses were not well distinguished from one another; for we find in the early entails the prohibitory clauses protected by an irritant clause, but no resolute clause, and sometimes they were protected by a resolute clause and not an irritant clause; and indeed when the decisions of the Court, even down to a late period, are perused, it will be frequently found that those two clauses are confounded together, and not properly distinguished; and indeed it is not till late times that the irritant clause has been properly applied to the annulling of the right granted, and the resolute clause to the forfeiture of the heir. What at first was thought to be the effectual mode of creating an entail against third parties was where the prohibitions were

protected by that clause which resolved the title of the heir to the estate. The efficacy of this occasioned much controversy; and it was at last brought to the test in the famous case of the Viscount of Stormount against the heirs of line and the creditors of the Earl of Annandale, 26th February 1662,* by which it was found that “ The
“ resolute clause was effectual against singular successours, espe-
“ cially considering it was so publick and *verbatim* in the sasine; and
“ that it was equivalent to an interdiction;” and of course this decision established the stamp on entails so constituted, that they are effectual by the common law of Scotland. There is no decision contradictory to this. It has, no doubt, been said that this decision was determined by a narrow majority; and farther, that it was contrary to the principles of law. But whatever may be in this observation, still it is undoubted evidence that the majority of the Court did hold that entails so made were effectual by the common law, even against creditors and purchasers.

This decision was acquiesced in by the country; and accordingly between that period and 1685 nineteen or twenty entails were executed on the footing and authority of that decision, besides many other entails which were not executed *in terminis*, so that whatever objection may be started to the opinion formed by our predecessors, still it is an opinion indicative of what was considered to be the law of Scotland; and therefore it is quite vain to maintain that no such common law right ever was sanctioned. In fact, at no period of our law, from the very primary existence of the Court, it never was for a moment doubted but that such deeds were effectual against the heirs and representatives of the parties; and the only doubt entertained was, how far they could be made effectual by irritant or resolute clauses separately, or by irritant and resolute clauses jointly; and there can be no doubt that latterly, even before passing the Act 1685, it was the opinion of all lawyers that where there were both irritant and resolute clauses to protect the limitations and restraints contained in an entail, it was effectual even against creditors and singular successors.

All this seems to be put beyond doubt from what appears from Stair 2, 3, 59, and 2, 3, 59 in fine, and from the decisions which he there refers to.

So standing the import of the common law of Scotland regarding this deed called an entail, the next important question comes to be, what are the alterations which have been made on this common law by the Act 1685, c. 22? It is of great importance to ascertain the state of the law previous to this statute, because it affords a key

* Mor. 13996.

to the interpretation of that act, and ascertains what rights the parties in such a deed had in consequence thereof after the passing of that act. In considering the import and effect of that statute two questions arise.

First, Is it an entire new constitution, settling the rules that govern the whole subject of tailzies, and therefore derogating from all former practice on the subject? In short, does the act authorize entails executed in a particular way only, which, if not followed, can neither be good against heirs or creditors? or,

Second, Is it merely a declaratory law, which, leaving the rights of heirs to remain as they then were, introduces regulations for the protection and security of third parties, that is, creditors and purchasers contracting with the heirs, and for preventing injury to them in such dealings?

A great deal of argument has been urged in favour of the first view as the proper interpretation of the statute; but it is clear that such a construction is neither warranted by the words of the statute, nor sanctioned by our elementary writers, nor by the decisions of the Court, nor by the opinions of our lawyers.

To suppose that the Act 1685 subverted the common law of Scotland is a most violent supposition; and to obtain that interpretation many obstacles must be overcome.

In the first place, that interpretation necessarily infers a complete alteration of the first principles of the law of Scotland, which confers on the proprietor the most complete power or *dominium* over his property, *nisi lex vel conventio obstat*. Heirs and representatives are by that law under the most complete control of their predecessor. His will, when clear and unambiguous, must be implicitly obeyed. The undeviating rule is, *Quisque est moderator et arbiter rei sue*. Now can it be supposed that the legislature of Scotland, at that period under all the influence of the feudal law, would sanction the tying up the hands of proprietors in favour of their heirs, or deny them the right of imposing restraints on those who should succeed them?

In the second place, if the legislature had any such intention as that of opposing the current of the common law, as promulgated by the decisions of the Court of Session, they would have said so in express terms. The able men who framed that statute never would have left that matter to be made a question or doubt of, but would have explicitly declared the view and intention of the legislature. Had such been the intention of those lawyers who were entrusted with the framing of the act, it was impossible that they would have expressed themselves in the manner they have done.

In the third place, it is likewise impossible to lay out of view the precise evil which was proposed by the act to be remedied. No

complaint ever was heard of regarding the effect of limitations upon heirs. Burdens upon them have always been considered as the natural consequences of the *jus disponendi*. But when the commerce of land became more frequent after the union of the two crowns, limitations on property to affect third parties were early felt as occasioning hardship, however imprudent such parties might be in not more strictly inquiring into the condition of those with whom they contracted. Historically we are informed, that this was the object of the legislature; and the tradition is not so very distant as to throw any doubt upon the authenticity of the account we have received. Now, such being the object of the legislature, to protect *bonâ fide* third parties from injury, it is not a correct interpretation to carry the import and effect of the act beyond that object.

In the fourth place, the whole structure of the Act of Parliament, from the beginning to the end, is adverse to that interpretation of the act. The terms of the act are extremely remarkable.

1. It sets out with a broad general declaration of what is the common law of Scotland: "That it shall be lawful to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit."

This is a substantive proposition *per se*, and of a declaratory nature; and as such it has been so considered.

2. The act requires the insertion of the irritant and resolute clauses in the procuratories of resignation, charters, precepts, and instruments of seisin, and requires a particular record in which the whole shall be registered. But it is plain, that all this is required for the sake of third parties alone, because no grantee or no heir can possibly be ignorant of his own title, by which he ever must be ruled.

Whatever is contained in the infeftment constitutes a complete legal obligation, and requires nothing further.

3. The after words of the statute are quite indicative of that view; "and, being so insert, His Majesty, with advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs" (which manner of expression plainly insinuates that so far the matter is taken for granted and supposed from the nature of the thing, and then follows), "but also against their creditors, comprizers, adjudgers, and other singular successors," which last was the only intendment of the statute.

It continues therefore a principle, and probably will to the end of the world, "That any quality in his own right must necessarily affect the possessor." These were the sentiments of that eminent lawyer Lord Kilkerran.

4. It is lastly declared in the statute, that if the heir shall omit to repeat the provisions and irritant clauses in the rights and conveyances, he shall forfeit his right; but that the same "shall not militate against creditors and other singular successors who shall happen to have contracted *bond fide* with the person who stood infeft in the said estate without the said irritant and resolute clauses in the body of his right."

Now it may be asked if the estate is gone to the singular successor, and the heir contravening forfeited, what can the substitute heirs have but a remedy at common law, and a claim for reparation, and, of course, that the act itself acknowledges a right which they have, although the estate has been for ever alienated from them?

There is, therefore, nothing in the statute itself which can sanction the supposition, that it was thereby intended to alter *in toto* the common law of Scotland.

In the next place our authors afford no sanction to such an interpretation of the statute; and those authors are entitled to the more regard, because two of them at least were accessory to the framing of that very statute, and of course must have known what was the object and intendment of the act. On this subject may be consulted M'Kenzie, vol. ii. pp. 149, 325, s. 2 and s. 3, Stair 2, 3, 58, who expressly points out the origin and object of the statute; the same is likewise stated by Bankton, 2, 3, 141; and in later times, just as distinctly by Mr. Erskine, iii. 8, s. 22, and s. 27, wherein he particularly observes that entails may be in many cases effectual against the heir of the granter, or against the institute who accepts of it, which cannot operate against singular successors.

Lord Kames may also be quoted on this part of the case, and is the more deserving of attention, as he learned the practice and science of the law under those eminent lawyers who were nearly coeval with the Act 1685. In the report of the case of Gordon of Carleton in 1753,* his Lordship disapproves of the decision, and he adds, "I admit that the case comes not under the Act 1685, but must be governed by the common law;" thereby admitting that the Act of 1685 does not regulate all questions of tailzie. "Further, I admit that clauses qualifying a personal right, or qualifying the possessor's right, must be good against a purchaser, whether voluntary or judicial; because a purchaser cannot take more than what is in the disponent. But prohibitory and irritant clauses have no such effect as to qualify the proprietor's right, whether infeft or not infeft. It appears to me evident that by the common law an entail is not good against creditors even where the heir of

* Sel. Dec. No. 55, p. 73. Mor. 10260.

“ entail is infest ; because a prohibitory clause does not limit the
 “ heir of entail’s right of property, but is only a personal pro-
 “ hibition, the contravention of which can go no further than to
 “ subject him to damages, or perhaps to forfeiture.” Now, if these
 institutional writers had been of opinion that the statute was a new
 regulation which affected heirs as well as creditors, it is utterly
 impossible that they should have so laid down the law.

There has been lately published annotations on Lord Stair, said to
 be by the late Lord Elchies, where he treats the doctrine of tailzies
 with great perspicuity and distinctness, pointing out the effects of
 that class of deeds, from a simple destination to the more limited
 entail, with all the machinery of its prohibitory, irritant, and resolu-
 tive clauses ; and in those annotations he most distinctly states and
 notices that provision whereby the heir shall not sell, nor dispose, nor
 contract debts, nor do deeds whereby the tailzie may be frustrated
 or irritated, although there be no irritant clause of the contravener’s
 right ; yet he says, “ There seems no question in that case that the
 “ clause not to alter or contract debts would be valid and effectual
 “ against the contravener himself and his other heirs, to subject them
 “ to the reparation of the heirs of tailzies damage, by the contraven-
 “ tion, not only from what has already been said, but likewise from the
 “ Act 1685, whereby a person may substitute heirs to himself with
 “ what conditions and provisions he pleases.”* Those expressions of
 Lord Elchies, one of the ablest of the lawyers and judges of his
 time, evidently showed that he considered that the introductory
 declaration of the statute is one explanatory and declaratory of the
 common law, and that he conceived that that common law was thereby
 preserved and in full operation.

In the third place, the decisions of the Court are equally satisfac-
 tory on this point, and it is quite unnecessary to quote many of
 them for such a purpose ; it is sufficient to show what was the opinion
 of the Court immediately after passing the act, and in later times
 when those earlier decisions were corroborated by subsequent
 practice.

The first case which may be referred to is the famous case which
 occurred between the family of Hamilton and the Earl of Callander,
 which attracted much notice at the time, and which was decided by
 the Court, 27th and 28th January 1687, two years after the passing
 of the statute. This case is to be found in Fountainhall, vol. i. page
 443.† “ The interlocutor ran upon three points, and Lord John lost
 “ them all ; 1mo, The Lords found the prohibitory clause contained
 “ in the tailzie was a sufficient ground for the next heir, or my

* Annotations on Lord Stair’s Institutions, p. 114, § 5.

† Mor. 15477.

“ Lord Livingstone, who on a bond had adjudged from him, to
 “ reduce on the Act 1621 any posterior, gratuitous, or voluntary deeds
 “ not depending on prior onerous causes, though it wants a clause
 “ irritant ; for that would resolve, irritate, annul, and reduce onerous
 “ creditors’ debts.” The other parts of the case are of no importance in this question. Now it appears impossible that the Court would ever have pronounced such a judgment if the act had been intended to render the situation of the heirs the same with that of a singular successor.

The case of Willison against Callander, 26th February 1724, may be referred to on this subject.*

It seems to be unnecessary to take notice of any other decisions till later times, but particular notice may be taken of two cases in 1791, where the late Lord Justice Clerk Braxfield had an opportunity of expressing his opinion on this very point. The opinions of that excellent lawyer are the more valuable on questions of this kind, because, besides his unrivalled knowledge, he had opportunities of informing himself on these topics beyond all other men who ever preceded him, or, in all likelihood, of any who will follow after him. The cause of this was, that he was appointed to investigate the titles of those persons which were forfeited in the year 1745, with the extensive vassalage which belonged to them, under the guidance and direction of the first lawyers of the time, and, from his having discharged his duty so well on that occasion, he was appointed also to consider the claims which were made by the landed proprietors on the abolition of heritable jurisdictions. From those circumstances there is perhaps no considerable estate in Scotland the titles of which did not pass through his Lordship’s hands in making this investigation. It is from those causes that he acquired such superiority over all other men in the discussion of those questions.

The first decision which required notice is that of a question which occurred in 1791, Henry Pierce and Attorney against Mr. John Russell and Hugh Ross of Kerse ; it does not appear to be regularly reported, but it will be found to be collected among the cases of the late Mr. Robert Bell, from 1790 to 1792, p. 166.

The question there was, whether creditors could carry off an entailed estate by special charges and adjudication, no previous steps having been taken by the heirs of entail to complete their right, and where the entail was personal, and where the institute was heir of line of the granter, and possessed without completing his title by infeftment, although, at the same time, the entail was recorded. This question naturally brought out the general principles of law

* Mor. 15369.

which are now under discussion, and, accordingly, on that occasion, Lord Braxfield thus expressed himself, “ It was debated in Annandale’s case whether tailzies were consistent with law. It was found that they were. They multiplied upon this decision. The Act 1685 did not introduce entails; it rather abridged the power of entailing which had been previously established at common law. The legislature seems to say to the people of Scotland, ‘ You are exercising a power which in England has been taken away; therefore, if you will entail, it must be done in a particular form, and unless that form be complied with, your entail shall not be effectual against creditors.’ In the present case the form prescribed by the statute has not been observed; although the entail has been recorded in the register of tailzies, no infeftment has followed upon it, therefore it is still open to the diligence of creditors.”

His Lordship had also occasion to express the same sentiments in a case decided in May 1791, M’Nair against M’Nair,* and where he again thus expressed himself:—

“ By the law of Scotland a person, who is not limited in the use of his property, may execute an entail. It has been said that this power has been derived from the act of parliament; but this is a mistake: Entails were in use long before the statute, and many questions have come before this Court in which entails were sustained prior to that enactment. Many estates were entailed before that time, and the statute was intended for a different purpose altogether,—it was meant to prevent fraud. The legislature said to the gentlemen of Scotland, ‘ You have, no doubt, a right to entail your estates, but as we foresee many inconveniences which must arise to creditors if this practice should become common, you must execute your entails under the forms which we now prescribe for the benefit of those with whom you transact. No statute was necessary to authorize a proprietor to entail; for that power he possessed at common law. Accordingly, if the forms and requisites of the act be not followed out, the entail is not good against creditors and purchasers. But though these forms are omitted, still the entail is effectual against the heir.”

Since that period no case can be pointed out where any lawyer has ever attempted to deliver a different opinion. From all this the conclusion seems to be quite inevitable, that the Act 1685 is nothing but a mere declaratory law restricting the former power of making entails, introducing something new for the security of creditors and purchasers, but leaving the heirs entirely on the footing they are

* Bell’s Cases, 1790–91, p. 546.

placed on by the tailzie itself, and according to the principles of the common law of Scotland.

The only other question that now remains,—the answer to which, indeed, is a sort of corollary from what has been already stated regarding the import of the Act 1685,—is this, Do heirs and substitutes stand in a different situation from creditors and purchasers? The distinction between them is plain and obvious; for, first, the obligation created and the right conferred is derived from their own assent and consent; and each heir and substitute, as he succeeds, declares that consent and assent by his claim and by his entry; and, secondly, all are coheirs and representatives; none have any preference in point of right over the other, except in priority of possession; the title of each to the estate is all of the same kind and nature, flowing to them successively.

It is unnecessary to enter into any detailed disquisition on this subject, as the principles are so plain, and the authorities are so express and so uniform, from 1685 down to the present time.

Our institutional writers are clear on the distinction, Stair 2, 3, 59; Bankton 2, 3, 133, 135, 139, and 158, in which last section he expressly states, “Where the tailie contains prohibitive clauses to contract debts, but does not bear any irritancy of the contravener’s right, the debts are effectual, it being against common justice that the debtor should retain his full right, and his creditors lose their payment, as is above mentioned; but in that case the next or any other substitute, who may succeed as heir of entail to him who contravenes, has good action against him or his representatives whereby to oblige him to purge the tailed estate of the debts, as was just said of a tailie with irritant clauses not duly recorded.”

Erskine 3, 8, 23, and 27, in which last section Mr. Erskine is as explicit. “A distinction must be made in this question between the heir of entail and his creditors; for entails may be in many cases effectual against the heir of the granter, or against the institute who accepts of it, which cannot operate against singular successors. Thus, when the act declares that no unregistered entail shall be good, the meaning is not, that they shall be ineffectual against the institute or other heirs of entail who have accepted of it with all its qualities, but that they shall have no force against singular successors, for whose special security the registration of entails was directed. For as the act was made to authorize entails, no general expression in it ought to be so explained as to destroy the effect of such entails as by the common rules of law were effectual antecedently to the enactment.”

Lord Elchies, in his Annotations on Stair, explains this part of the law with great perspicuity, and supports it with referring to various

decisions of the Court, which had been decided previous to his time. In the whole of that disquisition, from page 110 to 122, he is at great pains to point out constantly the distinction between heirs and substitutes, from creditors and purchasers.

The decisions of the Court, which contain the opinions of our judges and of our lawyers, are likewise no less uniform ; and in order to show that this is truly the case I have selected, from the reported cases, a series of those decisions from 1685 to 1815, in which cases will be found the opinions of the most eminent of our judges, who all concur in supporting the distinction. These cases are as follow, and some of them require attention :

- 27th and 28th January 1687, Earl of Callander. (Mor. 15477.)
- 26th February 1724, Willison against Callander. (Mor. 15369.)
- 17th February 1726, Hall v. Cassie. (Mor. 15373.)
- 2d February 1728, Lord Strathnaver against Duke of Douglas. (Mor. 15373.)
- 29th July 1761, Gordon Cumming of Pitburg v. Gordon. (Mor. 15513.)
- 24th February 1791, Gordon against M'Culloch. (Bell, 180.)
- 18th May 1791, M'Nair v. M'Nair. (Bell, 546.)
- 24th November 1795, Gibson v. Christian Kerr Reid. (Mor. 15869.)
- 13th June 1798, M'Gill of Kemback v. Agnes Law. (Mor. 15451.)
- 26th February 1801, Sutherland v. Sinclair. (Mor. No. 8. App. Tailzie.)
- 24th January 1811, Alexander Gordon v. Gordon of Ellon. (F. C.)
- 28th February 1815, Earl of Wemyss v. Earl of Haddington. (F.C.)
- 3d March 1815, Hamilton v. M'Dowal. (F. C.)

From the above selection out of many others, it does thus appear that the opinions of our judges have been perfectly uniform on the question. And such a series of *rerum judicatarum*, not to be met with on any other question, should make any Court pause before venturing to alter that branch of the law, after having been so long and so repeatedly considered.

Some of those cases deserve more particular attention. The first, that of the Earl of Callander in 1687, deserves notice on account of its being determined so soon after the Act 1685, and as it must have been decided by those judges and pleaded by those lawyers who were all accessory to the framing of the statute ; and it is utterly impossible the Court could have come to such a determination, if it were true, as now contended, that the Act 1685 applies to heirs as well as to singular successors.

The next important case which has been prominently brought forward upon the present occasion is that of Lord Strathnaver against the Duke of Douglas in 1728. In that case the grandson of

the entailer rejected the entail, and immediately on her death served heir to her, and charged the estate with his own and his father's debts. On his death, the next substitute, who was heir of provision, but not heir of line, vested himself with the entailed estate, and brought an action against the representatives of the grandson, "to disburden the tailzied lands of the debts laid upon the tailzie by the said earl, contrary to the express intention thereof." And the pursuer maintained that he was insisting in nothing but a common action for reparation; and accordingly the Court found that the heir was bound to disburden the entailed estate, and to relieve the heirs of tailzie of the debts.

It seems to be admitted on the part of the pursuer that the decision was just; but it is observed that it was not because he was heir of entail, but because he was heir of line and representative of the entailer, "liable to implement all the entailer's obligations of every nature and description." But it is obvious that this admission, that the heir of line was bound to fulfil this obligation, is fatal to the argument; because every heir of entail fully and completely represents the entailer in every obligation which he has created by or which arises out of the deed; and although the heir of entail has a claim of relief against the heirs of line and general representatives, every debt or deed upon which an action could be raised against the entailer himself must be actionable to the full value of the estate against the heir of entail.

There was no room for deciding whether a prohibition to alienate and contract debt implied a prohibition to alter the order of succession. There was no alteration of the succession attempted. The Duke of Douglas did not lay claim to the estate, but Lord Strathnaver was allowed to take it up. No doubt there is an argument maintained by the Duke, that because there is no express prohibition against altering the succession, therefore that he is not bound to disburden the estate of debts. This, however, was merely a plea thrown in by the defender, resorted to for the purpose of getting quit of the claim.

But every sort of objection to the authority of this case is completely done away by what afterwards occurred in the further discussion of this case in the House of Lords; for, upon investigation, it is now discovered that this case was brought under appeal, and where the point presently under discussion was alone considered and decided. This will be found in a report of the case published within these few days.* The arguments of the respondent were as

* Craigie and Stewart's Reports, p. 32.

OPINION OF LORD BAI

follow: " 1. Although by the
" persons to entail their estates
" tive, and that such entails, bei
" tual against creditors; yet b
" person previously had of lim
" regard to one another was no
" law was only to ascertain how
" with a person having an ent
" declared that they were not
" the entail, unless it was pro
" between the heirs, entails, alth
" deeds of the ancestor, must b
" they would have been before t

" 2. The Countess of Sutherl
" obliged her heirs to resign the
" under the conditions mentione
" in terms of the obligation wou
" at law, there was no occasion to
" not possess by any other title.'
" hibited by the condition where
" the conditions of the entail.
" served heir at law to his grand
" the performance of all obligat
" sequently to resign in terms of

" Every substitute is a credito
" the institute, whose renunciati
" competent to himself can hav
" other heirs of entail.

" 3. The Earl of Forfar's esta
" ceeded, must clearly be liable
" evident that both the act of pa
" of it, would avail nothing; fo
" omitting to insert in the subse
" the prohibitive and resolute
" to charge the estate with debts
" the money in what manner he

" After hearing counsel, it is c
" appeal be dismissed, and the
" of be affirmed; and it is further
" to the respondent the sum of
" said appeal.

" For appellant, P. Yorke Dur

" For respondent, C. Talbot an

This case, therefore, is perfect

b

The next case deserving of notice is that of Gordon of Pitburg, in 1761, where it was expressly found that "the pursuer is laid under a prohibition of selling or alienating the estate to the prejudice of the substitute heirs of tailzie; and therefore, that, however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages at the instance of the substitute heirs of tailzie."

It has been said, on the part of the pursuer, that the whole argument in this case was confined to the point, whether the prohibitory clause imported a prohibition against selling: this, no doubt, is true; but the only reason why the eminent counsel for the heir of entail did not argue, that though there is a prohibition, a contravention of it gave no claim for reparation, was, because this was held not an arguable point.

As to the four special remarks which have been stated as to this case, in order to affect its weight as an authority, it may be noticed, as to the first, that the defenders expressly disclaim any different mode of interpretation between heirs and creditors in the third article of their answers.

Secondly, There was unquestionably in the case of Pitburg a necessity for finding that the contravener must re-invest, although he fell under the prohibition to sell; for it is forgot by the present pursuer that the case of Pitburg was an entail without an irritant clause, and therefore not good against third parties, so that the heir so prohibited might have made a valid sale; and thus it was necessary, in conformity with the express conclusions of the summons, to find what would be the effect of a sale as to the heir, just as much as it is necessary to exhaust the summons in the present case by finding the purchaser safe, but that the seller must re-invest the price. The nature of the entail of Pitburg has been quite overlooked.

Thirdly, It is held by the present pursuers that Lord President Miller overlooked one view of a tailzie, because he held another view sufficient, viz. that there was no prohibition to sell; and the recent case of Blairhall is referred to as an instance: but this is not a parallel case. The two decisions in the case of Blairhall arose out of different parts of the deed, and at the instance of different parties having different interests. The first decision ascertained that the reference to the institute was sufficiently explicit to bring him under the entail, so that the creditors who were pursuing in that case could not make their debts effectual against the estate: 27th February 1799, Syme against Ranaldson Dickson.* Then it was afterwards

* Mor. 15473.

found that there was no effectual prohibition against altering the order of succession: so that the heir altered the tailzie, and then disposed of the estate. There was obviously no necessary consequence that in endeavouring to make out the first point the others should have been pleaded by the counsel, as this would not have benefited the creditors against the will of the heir. But here, as in the case of Pitburg, the matter arose out of the same clause; and if the clause imported a prohibition, the question arose, what was to be its effect on being contravened? This, too, was one of the conclusions of the summons; and the consequence was not, and could not be, overlooked, for, as already stated, it was given effect to in the interlocutor of the Court. If the conclusion there come to could have been disputed, it would no doubt have been so in the reclaiming petition. To overlook it was impossible when thus brought out both by the summons and interlocutor of the Court. But Lord President Miller, laying it down that there was no express prohibition, argues first, that the clause does not imply a constructive prohibition to sell; and, secondly, if it did, such would not supply the want of express words. He concludes his argument with the following remarkable passage; in fact, it is a direct admission of the law which that great lawyer held to be indisputable. “ Upon these grounds the petitioner hopes that he has sufficiently supported the first conclusion of his summons, by which he seeks to have it found and declared that he is not prohibited to sell; and if so, the other conclusion must follow of consequence, for if he is at liberty to sell, he certainly can employ the price as he pleases, without being accountable to any of the succeeding heirs of entail. Such was the effect of the judgment given in the case of Carloury, and must be in every case of the like nature. For if the heir of entail is under no prohibition to sell, the after heirs of entail can have no action of reparation upon account of such sale. It is only when the heir does what the English law calls a tortious act, by counteracting the prohibitions of the entail, that he is obliged to make up the damage to the succeeding heirs; as when he is prohibited to sell, or contract debts, without any clause irritating the deeds of contravention, the sale, or debt contracted, will be effectual against the estate, but the heir contravening will be liable in damages to the after heirs of entail. But, as in this case the petitioner is not prohibited to sell, he will not, by selling, have done any tortious act, and consequently will not be liable for any claim of damages to the after heirs.”

Fourthly, It has been said by the present pursuer that there might have been strong reasons for not urging the plea that an heir

selling was not bound to re-invest; but the conclusion of the summons in the case of Pitburg, which brought the case into Court, has been overlooked; for there it is expressly required to re-invest. But the supposed reasons are quite insufficient to prevent the heir from urging this plea. Although the argument that there was no prohibition against selling, was good, it had been overruled, and it was then high time for the heir to resort to his other plea, if he thought it good, in the case of a prohibition. And as to inhibition, supposing Lord President Miller ignorant of a decision in the case of Bryson* in the year before, (which is certainly rather a violent supposition, as it was a remarkable case, and where the Court had not followed the opinion of the authorities,) there is nothing in his admission that can make it be supposed that his views were influenced by the possibility of using inhibition. No inhibition had been used, and it does not appear how inhibition had any thing to do with the question. Nothing, then, has been said which can shake or affect the authority of this decision.

The next decision deserving of notice is that of Gordon against M'Culloch, 24th Nov. 1791, which brings out the question in its best form. This case will be found collected by Mr. Bell in his reported cases from 1790 to 1792, p. 180; at the same time the report of the case has been compared with the printed papers which have been furnished from the collection of the late Sir Ilay Campbell, and an opportunity has been thereby offered of examining his lordship's manuscript notes. The case was this: Edward M'Culloch of Ardwell executed an entail of his estate, and he disposed the same to himself and to David M'Culloch his son, nominatim, and a long series of substitutes, with certain reservations and conditions, and clauses irritant and resolute. Although, from the form of the deed, David M'Culloch appeared to be the institute, yet, from other parts, from the power of altering, and the life-rent of the entail, being reserved, it was doubtful how far the institute might not be considered as an heir. It so happened that the prohibitory clause was complete, and was directed against David M'Culloch, nominatim, but the irritant and resolute clauses were directed against heirs and substitutes. If, therefore, under the entail, David M'Culloch was to be considered as the institute, he had the power, under the principles of the case of Duntreath, both to sell and to contract debt. Accordingly David M'Culloch, after possessing the estate for a number of years under the entail, attempted first to sell the estate, and thereafter to execute certain heritable bonds and

* Bryson and Chapman, 22 Jan. 1760. Mor. 15511.

dispositions in the view of burdening the estate ; the consequence of which was, that a challenge was brought at the instance of Mr. William Gordon of Campbeltown, the next substitute in the entail, for the purpose of declaring that all the deeds executed by David M'Culloch to affect the estate were null and void. The Court, on a due consideration of the deed of entail,—and particularly on considering the case of Livingstone against Lord Napier, 3d March 1762,* decided in the House of Lords, affirming the judgment of the Court of Session,—were decidedly of opinion that David M'Culloch was to be considered as an heir, and of course that the irritant and resolute clauses were effectual against him. But, at the same time, the Court took up the other ground, and considered what would be the effect of prohibitory clauses, supposing that David M'Culloch had been held as an institute ; which, of course, brought out the present question purely and completely. And accordingly Sir Ilay Campbell, whose opinion also is most valuable in cases of this kind, distinctly stated, “ Here the prohibitory clauses are clearly effectual against David M'Culloch ; and “ though the irritancy should not be found to affect him, yet, as the “ prohibition would found the substitutes in an action of damages “ against him, it is to be feared that freeing him from the irritant “ and resolute clauses would give him but little ease.” The opinion of Sir Ilay Campbell is the more valuable, because he is one of those judges who were of opinion that the case of Duntreath was well decided, and, of course, felt the full force and effect of the observations so strongly urged by the present pursuer, that entails are to be strictly interpreted, and that no obligation is to be inferred by implication.

The next case deserving of notice is that of Gibson against Christian Kerr Reid, 24th November 1795,† where again are recorded the opinions both of Lord Justice Clerk Braxfield and Sir Ilay Campbell. The case there, was, whether terce could be claimed out of an entailed estate, where the entail was defective in so far as it did not irritate sales nor debts contracted contrary to the conditions of the deed. The widow of the last heir of entail claimed an aliment out of the estate, and the question, therefore, came to be tried, whether the right of terce should be considered as excluded by the deed of entail ; and this led to the discussion of the foundation of entails by the common law, and the effect of the Act 1685, and as to the distinction betwixt heirs and

* Mor. 15418.

† Mor. 15869.

singular successors. Upon that occasion Lord Braxfield stated,
 “ The power of making an entail is not founded on the Act of
 “ Parliament,—it is founded on the feudal law of Scotland. There
 “ were entails in this country before the Act 1685. The matter
 “ was finally decided in the case of Annandale; there it was deter-
 “ mined in favour of the heirs of entail; and from that time to this
 “ the justice of that decision has never been called in question.
 “ This decision gave rise to many entails of great estates before
 “ the Act 1685, and, so far was that act from giving a right to
 “ make entails, that the meaning of it was this: seeing entails are
 “ going on, it is necessary to curb them, for creditors and strangers
 “ may be imposed upon and materially injured; therefore, where
 “ entails are made, they should be attended with certain solemnities:
 “ accordingly, two records were appointed; the conditions were
 “ directed to be put into the investitures of the estate, and thence
 “ into the seisin, and a new record of entails is created. These
 “ regulations affect entails made before as well as those made after
 “ the act. And so it was found in a case decided in this Court,
 “ which was afterwards affirmed in the House of Peers.

“ It was said in the pleadings, that, in order to secure an estate
 “ against the claim of terce, irritant and resolute clauses were
 “ required. But these are necessary only to save against the deeds
 “ of the proprietor, not against the acts of the law. What are you
 “ to annul in excluding the terce? I apprehend that neither
 “ irritant nor resolute clauses are necessary for guarding against
 “ the provisions of the law; it is enough that the proprietor, in
 “ conveying his property, has qualified the right; that he has made
 “ this exclusion a condition of the entail, and this he can do in two
 “ words, by saying ‘ I exclude the terce and courtesy.’ ”

Sir Ilay Campbell. “ My opinion coincides with the second
 “ which was delivered, and with that which has been just now so
 “ well expressed. In judging of this question, I will give my opi-
 “ nion as I would have done in the year 1684, had I been then alive
 “ and sitting here; or as if the legislature were now to repeal the
 “ Act of 1685, for I think that act is entirely out of the question.

“ The history of entails was very well given in the second opinion.
 “ For a long time past the right of refusal in the superior has been
 “ circumscribed, and the proprietor has had the power of conveying
 “ his property under what conditions he pleases; and the only
 “ question that ever has occurred has turned on the power of
 “ excluding creditors or purchasers; but it never has been doubted,
 “ either before or since the Act 1685, that in questions with heirs
 “ the disponent might add what conditions he chose.

“(The case of Stormont stated.) In that case the opinion was,
 “ that the limitations appearing on the records, they were therefore
 “ effectual against creditors and third parties; and thus stood the
 “ law down to the act 1685. By that act a double registration of
 “ the conditions and limitations is required; the object of the act
 “ being the safety of creditors, without any view to restrict the
 “ powers of proprietors further than the safety of creditors rendered
 “ it necessary; and this was to be attained by the double registra-
 “ tion of the entail, and to put both creditors and purchasers on
 “ their guard, and by declaring that without that double registra-
 “ tion the entail should not be binding.”

Another similar case occurred a few years after, 13th June 1798, M'Gill of Kemback against Agnes Law,* where an entail excluded the terce, and prohibited the heir in possession from giving a higher annuity to the widow than a certain proportion of the rent; and it was found that she was excluded from the terce, although the entail was otherways ineffectual against singular successors. This observation was made by the Court: “ The Court, on advising memorials,
 “ considered that case (Gibson against Kerr Reid) to be decisive
 “ of the present. In the former case it was observed, the entail,
 “ though recorded, was ineffectual against creditors, from wanting
 “ an irritant clause. But irritant and resolute clauses, and conse-
 “ quently registration, are unnecessary to make entails effectual
 “ *intra familiam* of the substitutes.”

The next case deserving of notice is that of Sutherland, 26 February 1801,† which is of considerable importance. It has been said, on the part of the pursuer, that the case related to another point altogether, and that there was not any argument on what occurs in the present case. But it may be observed, that in making this statement the Session Papers in the case of Sutherland cannot certainly have been examined. The action in that case was brought against the representatives of the heir of entail who, having a power to sell for the entailer's debts, sold and paid off the debts both of himself and other prior heirs. The entail contained a prohibition against contracting debts, and an irritancy of the heir's right on contravention, but no irritancy of the debts. Debts were contracted, and the entailed estate sold by the creditors. The next heir, stating it “ as a clear
 “ point that an heir of entail has a claim against the representa-
 “ tives or separate estates of preceding heirs for relief of the damage
 “ he has sustained through the entailed estate being either utterly
 “ evicted or improperly burdened,” brought an action to have it found that he was a creditor to the extent of the price at which

* Mor. 15451.

† Mor. No. 8, App. Tailzie.

the estate was sold, and that the executors of the heir should be liable for the amount. The defence was, that the heirs of John Sutherland (one of the substitutes, in which character the pursuer insisted) were omitted in the dispositive clause. This was overruled, as it was held that this unintentional omission was supplied by the procuratory of resignation; and the argument was held good, that, “although debts contracted by an heir under an entail, which omits to irritate such debts, are good to the creditors, yet a simple prohibition to make such contraction is sufficient to entitle the next heir of entail, upon his succeeding, to demand relief out of any separate estate belonging to the former heir of entail.”

The defenders maintained on their part, as to this plea, “that an action of this nature founded upon a clause merely prohibitory is somewhat new and uncommon, and particularly improper in the present instance, where the sale of the estate of Pulrossie was chiefly occasioned by the debts of the original entailer affecting it. But what the defenders are more particularly to direct your attention to is, that the prohibitory clause does not restrain an alteration of the succession,” &c.

The other defender Baillie seemed to admit the conclusion if the prohibition applied to contracting debt; and contended that he was only liable *in valorem*; in support of which he referred to the cases Dict. v. 4. p. 45.

The reclaiming petition for Sinclair’s representatives argues the case fully and ably under these two heads:—

1. The pursuer had no title to insist as heir of entail.
2. The heir in possession did not contravene to the effect of rendering his representatives liable in damages to the subsequent heirs. The argument under this last head was,

1. Because the prohibition applied “to the heirs male and of tailzie,” the party contracting being heir of tailzie, but not heir male.

2. Because it was within the power of the heirs to alter the order of succession; and “what he might have done as to the estate itself, he had power also to do with equal validity and effect, as to the reversion of the price, which came to be a *surrogatum* in place of the estate.”

“Lastly, the petitioners submit, that in order to entitle an heir of entail, in such a situation as the pursuer, to maintain an action of damages against a prior heir, he must be able to show that he himself has conformed precisely to every thing which the entail required of him.

“Further, the petitioner must not omit to remark, that the entail gives no countenance to the petitioner’s libel as laid. The pur-

“ suer does not conclude to have the reversion of the estate of
 “ Pulrossie laid out upon land in terms of that entail ; he concludes
 “ for payment of a sum of money, in order, no doubt, that he may
 “ have it in his power to spend it next day in any way he pleases.”

Here, too, the claim of reparation, if a prohibition was contravened by the heir, was considered too clear to be questioned.

The next case deserving of notice is that of Gordon of Ellon, 24th January 1811, and in which will be found the opinion of the late Lord President Blair. The question there was, whether an heir of entail in possession was entitled to pull down the mansion-house of the entailed estate for the purpose of selling the materials thereof? The entail contained expressly a disposition to “ the town and
 “ fortalice of Ardgight, now called Ellon Castle, yards and orch-
 “ yards thereof.” The prohibitory clause was in the following terms :
 “ That it shall not be in the power of the said William Gordon, &c.
 “ to sell, alienate, or impignorate, or dispone the lands, baronies,
 “ and estates above mentioned, or any part thereof, either irre-
 “ deemably or under reversion, or to burden the same, in whole or
 “ in part, with debts or sums of money, infestments of annual rent,
 “ or with any other security, servitude, or burden whatever.”
 Upon this occasion the Lord President observed, “ The general
 “ principle of the law of Scotland on which the petitioner founds is,
 “ that restrictions on the use of property are not to be extended by
 “ implication,—a principle which never has been and never will be
 “ altered. But although restrictions are not to be created or ex-
 “ tended by implication or presumed will, *de casu in casum*, yet
 “ where limitations exist, these are to be construed according to
 “ the usual and legal import of the words. Upon this ground a
 “ lease for more than the usual length was construed as coming
 “ under a prohibition to alienate : Duke of Queensbury against
 “ Earl of Wemyss, 17th November 1807.”

The two other decisions which have been selected, 28th February 1815, Earl of Wemyss against Earl of Haddington, and 3d March 1815, Hamilton against M'Dowal, I refer to for the purpose of bringing under notice the opinion of that eminent judge the late Lord Meadowbank, whose opinions on feudal questions are entitled to the highest respect. In the report of this latter case a mistake has been fallen into by the reporter, as if his Lordship had been of opinion that the Act 1685 made the deed of entail now entirely a statutory deed ; and the reporter also falls most undoubtedly into a mistake, as making his Lordship state that the late Lord President Miller and the late Lord Justice Clerk Braxfield were of opinion that entails stood on no other foundation than the statute 1685. This is most unquestionably a total mistake. What his Lordship meant to convey was this,

that, so far as creditors and purchasers are concerned, entails are to be considered as a mere statutory regulation ; and that if the forms of the statute be not strictly observed, the deed would be of no effect against them. But it never was, and never could be his opinion that deeds of entail are totally ineffectual against heirs in that situation ; or that they are, as to their other obligations, unsupported by the principles of the common law. Accordingly this is clearly demonstrated by his note on the previous case of Sir William Elliot against the heirs of entail of Stobbs, 19th May 1803. His note upon that case is as follows :—

“ Elliot against Elliot, 19 May 1803.

“ Q.—Defective, irritant, and resolute clause in tailzie ?

“ Suspend letters in suspension, and sustain defences in declarator—Methven, Cullen, and myself, *valdè repugnantibus*—Rest of court held that Sir William is bound by the entail as it is—all, however, agree that Sir William would be liable in damages were he successful.”

From this it is perfectly evident what his Lordship's meaning was in the case of Hamilton,—that it was merely so far as regarded creditors and purchasers the Act 1685 was to be considered as a pure statutory regulation ; and of course that the reporter has stated that matter too broadly ; at least it should have contained the exception, which was his Lordship's opinion on the subject.

From examining those decisions for a period of no less than a hundred and thirty years, it appears to be quite clear that the law of Scotland always has acknowledged, and does still acknowledge, a distinction between the claims of heirs and those of singular successors ; and that it is impossible to alter those decisions of the court without a total disregard of the original principles of the law of Scotland.

It is perhaps improper to resort to the opinions of living authors ; and it is to be understood that they are not referred to as authority. But still they may be resorted to as evidence demonstrating the existing understanding of the profession on the subject, and that that understanding does still exist at the time when they are giving their works to the public. Thus, Mr. George Joseph Bell, in his valuable Commentary on the Laws of Scotland relative to Mercantile Jurisprudence, takes notice of the distinction betwixt heirs of entail and the creditors. Vol. i. p. 45, 46, edition 1816. Also Mr. Sandford, in his late Treatise on Entails, published in 1822, observes, p. 54, “ These decisions appear to be sufficient to establish the right of the substitutes to demand fulfilment of the personal obligation in their favour, or reparation for its breach. But as the obligation is not real, and therefore does not give the substi-

“ tutes a *jus vindicandi* over the property itself, they cannot inter-
“ fere with the power of disposal which the possession of the fee
“ gives. It is considered that the personal obligation does not take
“ from the heir the power to alienate, although it takes from him
“ the right.”

In considering the effect and purview of the statute 1685, it appears that those who maintain that that statute has made a complete revolution in our law, and has destroyed all entails, except those which are executed in terminis of that statute, have not attended to the consequences which would ensue to the other principles of our law. For it is to be remembered that entails are executed and are effectual relative to subjects which never can be brought under the operation of the Act 1685; and of course, if it were held that the common law upon that subject were annihilated, all these deeds which have been hitherto held to be effectual from time immemorial must also be considered as entirely nugatory, even in a question *inter hæredes*. By the law of Scotland leases may be tailzied; also money and moveables of all descriptions, such as books, statues, pictures, plate.

Thus Bankton, 2, 3, 151, states “ moveables may likewise be tailzied, so that they cannot thereafter be gratuitously alienated in prejudice of the substitute. But still such bonds of this last kind may be affected by the institute’s debts; and purchasers of such moveables *bond fide* are secure, in respect of the free commerce of them.”

The Court was clearly of this opinion respecting the famous jewel which was given by Gustavus Adolphus to the celebrated General Leslie. 27th February 1683, Earl of Leven *v.* Montgomery.* See also Sandford, page 153.

But what, of all, is decisive upon this question, is the determination both of this Court and of the House of Lords upon the effect of entails, which are allowed to remain personal deeds, that is to say, on which no infestment has followed, and which have not been recorded. If the common law was entirely annihilated and subverted, and nothing but a statutory regulation, equally effectual against heirs and creditors, it would be totally absurd to maintain that the entail in its most incomplete state could be effectual; and any little omission of the entail in carrying it into execution would render it totally inefficient. And yet both this Court and the House of Lords have uniformly found that an entail which remains personal is effectual, not only against heirs, but also against creditors and singular successors; which cannot possibly be

* Mor. 3217.

sustained upon any other principle than by allowing the operation of the common law.

So that, by taking all those matters into consideration, it appears to be quite impossible to maintain that the Act 1685 alone gave effect to entails in Scotland. It was merely a regulation restraining the effect of entails against creditors and singular successors, for their security and protection.

In this question it is of great importance to ascertain the original foundation on which entails depend, and the true import of the Act 1685; because if the common law of Scotland is admitted to have its proper and due operation, then the door is opened to all the analogical argument which has been so well adverted to by the counsel for the defenders. It then becomes proper and competent to refer, after the obligation is truly established, to all the doctrine arising from contracts of marriage; and also to refer to those principles of our law which are to be found under the heads of "Personal and Real," and "Approbate and Reprobate," from all which most apposite illustrations may be derived.

It is now only necessary to advert to some of the special pleas on the part of the pursuer.

The first is, that no inhibition is now allowed upon an entail; and that as all obligations may be made the foundation of that diligence, it is to be inferred that in the case of an entail, where there are no irritant or resolute clauses affecting the prohibition, there is no proper obligation created.

Secondly, it is urged, that the plea of the defenders would be productive of great inconvenience, and in some respects entirely nugatory.

Thirdly, that where there is an irritancy in the entail, no damages can be claimed.

With respect to the first, the argument, as put on the part of the pursuer, is extremely imposing; but on examination it is not founded on correct principles, and the premises are wrong from which the conclusion is drawn.

In considering this question, upon which so much argument has been bestowed, it is proper to attend, first, to the nature of the diligence of inhibition; and, secondly, to the nature of the right of heirs and substitutes of entail.

As to the nature of the diligence of inhibition, it is to be observed, first, that originally inhibition was not allowed *nisi causâ cognita*, and this in all cases whatever. Even at this day it is issuable *de jure* only on present liquid obligations.

Secondly, inhibition is a mere personal diligence or interdiction, and has no effect whatever on the right which is vested in the

creditor ; it neither makes it better nor worse. It is analogous in fact to the *aquæ et ignis interdictio*.

Thirdly, inhibition is applicable to *acquirenda* as well as *acquisita*. The diligence falls with the death of the debtor ; and when used by a substitute heir of entail must also fall by his death, when his interest is gone.

In the fourth place, it is not true, as alleged by the pursuer, that inhibition is allowed on all obligations. The pursuer assumes as an universal affirmative what is only a particular affirmative, and in that respect one of his premises is totally wrong ; for instance, inhibition is not allowed on the obligations contained in marriage contracts, where the children take as heirs ; it is not allowed in pure conditional obligations, unless under particular circumstances ; and, what is more to the purpose, and more applicable to the present case, inhibition is not allowed upon obligations of warrandice.

In the fifth place, an inhibition can only be used by a substitute against an heir, when that heir actually succeeds, and takes upon himself the obligations in the entail ; and as the diligence is only personal, it never can protect against mere debts which have been contracted by the heir previous to the succession to the entailed estate, so that in such cases the diligence is imperfect to the end supposed by the pursuer.

Again, as to the right of heirs substituted in the entail, it may be observed that, to allow such a diligence would be productive of great hardship and great inconvenience ; and, as the law now stands since 1685, would be completely adverse to the principles of that statute.

In the first place, to allow an inhibition against an heir of entail succeeding would be extremely unjust, as it proceeds on the idea that the heir of entail in possession, in place of complying with the will of the granter, and the intention of his benefactor, means to commit a wrong and a fraud against him ; whereas the contrary is the presumption of law, that he will comply with the will of the donor, and that he will fulfil the obligations to which he has assented.

In the second place, nothing could be a greater hardship against an heir of entail, as the inhibition executed against him would affect all his unentailed property, whether acquired at the time of his accession, or acquired during any time of his life, during his possession of the entailed estate, so that he must be under the necessity upon every occasion of finding caution to the Court, under some limited restriction as to caution.

In the third place, the diligence of inhibition would not increase the extent of the *jus crediti* of the substitutes in the smallest

degree. If their right has been personal prior to the inhibition, it will remain personal after it; if it was imperfect, it must remain so after the diligence: so that this diligence never can have the smallest effect upon the original right; and if that original right be not effectual against third parties, it will not be made effectual against them by using the inhibition: and, so far as regards the heirs and representatives, the diligence of inhibition is of no use, for the obligation is complete without it, and it is only applicable against third parties.

From this it is evident, that after the Act 1685 it would in general be improper to allow the diligence of inhibition to remain as a mode of protecting the personal obligation contained in the prohibitory clause; for if that had been the case, then it would have been the Court authorizing a mode of entail which the Act 1685 has expressed in so many words never could be effectual against third parties unless certain means were used; so that the diligence of inhibition would impose nothing but hardship upon the heirs of entail, because it is not effectual against third parties; and the obligation against heirs never required the aid or assistance of such a preventive remedy.

The whole of this doctrine will be found extremely well explained in a case decided by the Court, 3d June 1748, *Gordon v. Sutherland* (Kilkerran p. 197.)* The case is well worthy of perusal. The Court were much diffculted on the point, particularly as it had been the practice to protect of old the prohibitory clause by inhibition; and accordingly the Court varied in their judgment; but at last it was correctly decided, that that diligence could not have effect against singular successors. The opinion expressed by Lord Kilkerran is of importance. "Such of the Lords as remained of opinion for the former judgment, were not satisfied why even an obligation to transmit a succession, with a clause of warrandice, may not, by the force of an inhibition upon it, be rendered of the same effect against all and sundry the lieges as it is against the granter. It must at the same time be owned, that the last judgment is more agreeable to the notion that every body has had, and which even the Court has formerly entertained, (*vide* the decision observed by Dirleton,† 24th January 1677, *Grahame contra Home*), and is the more expedient of the two, as the giving such force to the inhibition would be in effect to make a common contract of marriage, with an inhibition on it, equal to an entail."

"N. B. Both the above judgments were upon an appeal to the House of Peers affirmed on the 7th March 1751."

* Mor. 4398.

† Dirleton, p. 214. Mor. 12887.

In the fourth place, the pursuer seems to be mistaken also as to the effect of inhibition; for he seems to suppose that if this diligence be allowed it would afford a complete protection to the deed of entail, and that it would demonstrate that a proper obligation does exist, as thereby the estate would be protected. But in this the pursuer is under a complete misapprehension. The diligence of inhibition would not affect the property; it is merely a personal diligence, and of course only affords a ground of reduction if any thing be done to contravene the diligence; but it affords no claim against the singular successor to restore the subject, which he has acquired contrary to the prohibition. Thus, if a purchaser acquires land, or other heritage, in the face of an inhibition, and if a reduction is brought of that conveyance, he is entitled by law to maintain the possession of the subject so acquired, provided the price is still *in medio*, in his hand, and is the complete value of the subject at the time of the challenge: in that case the subject cannot be reclaimed, and the law holds the price to be a *surrogatum* for the estate. This will be found decided, 1st February 1739, Carlyle v. Mathison's creditors, Kilkerran, *voce* Inhibition, No. 1.* The diligence and effect of inhibition will also be found extremely well explained in a case decided by the Court, 19th July 1777, Monro v. Gordon's creditors.†

The result of those authorities unquestionably is, that the pursuer is under a total mistake when he contends that, because no inhibition is allowed upon the prohibitory clause, that therefore no obligation exists. That is not the principle on which the inhibition is refused.

But moreover, and in the last place, the pursuer forgets that inhibition is only refused so far as regards the sale of the entailed lands; and it is to such a case that the decisions apply. But when an action of damages is competent, the heir of entail has taken into his possession funds which have come into his hands as a *surrogatum* for the lands; and where the heir has separate funds of his own, every diligence of the law is competent against him—inhibition as well as personal diligence.

In the second place, it has been urged by the pursuer, that the claim of the defenders would be productive of great inconvenience, and give rise to constant litigation; for as the power to sell is still inherent in the heir of entail, there would be a constant succession of selling and reinvesting. As to this it may be observed, that this is no good answer in a court of justice to any person insisting on a legal right. It is to maintain that the heir of entail is to have a right, because he has it in his power to commit the injury another time; or to justify one wrong by another wrong. But if an obliga-

* Mor. 6971.

† Mor. No. 1. App. Inhibition.

tion is created, a court of justice is bound to give effect to it, whatever be the consequences; and justice is not to be denied because it may be productive of inconvenience. No man ought to reap benefit by his own injustice, or the infringement of the rights of others. But the objection makes a greater appearance in imagination than in reality; for if the Court does find that the heir of entail has no right to benefit himself by the contravention of his own obligation, heirs of entail will think twice before they infringe the prohibition, and will seldom venture upon it, except for the benefit of themselves, and their succeeding heirs: of which many instances might be given; in short, if the proper right of the parties is ascertained, the power of sale will seldom be exercised.

As to the trouble of reinvesting, practically, no difficulty can exist; and many instances of this can be given in our law. As has been already noticed, tailzies are not confined to land, but may be extended to other subjects. Both personal and moveable bonds may be tailzied, and on payment of such debts such payments may be funded in such a manner as to prevent the heir of entail in possession from squandering the money: and all this is quite consistent with the forms and principles of the law of Scotland. In this way tailzied money may be taken up and reinvested without the smallest trouble.

In like manner property and money secured to wives, exclusive of the administration and right to the husband, may, when changed, be reinvested, and during the course of a long life have frequent occasion to be so; and all this is done without the smallest inconvenience.

Also, of late years no inconvenience has been felt in reinvesting the money arising from entailed estates, which have been assumed by the public for public purposes; such as roads, canals, and public buildings.

But the best example of all which can be given of the practical exercise of this power is that which regards teinds, which are frequently entailed along with the lands; and many valuable entailed properties contain right to the teinds of lands belonging to third parties, which are both extensive and valuable: and as teinds were and commonly are feudalized, they are the proper subject of the Act 1685. Now, it is well known that by the Act 1683, c. 17, heritors of land are entitled to purchase their teinds from the titular at so many years purchase, according to circumstances. When the heritor takes the benefit of this act, which he is entitled to do at this day, those teinds are withdrawn from the entail, and nothing remains but the price. This is an Act of Parliament, it will be observed, that existed even prior to the acknowledgment of entails under the common law in the case of Annandale, and prior to the Act 1685, and of

course entailers subsequent to that Act of Parliament are bound to attend to the consequences of that statute; and yet I have never seen any entail whatever that ever has provided against the sale of teinds, or pointed out how and in what manner the prices ought to be applied. The Court of Session, however, have, upon the broad principles of the common law, and of common justice, provided against this; and accordingly, as early as the year 1708, the Court found that the prices received by an heir of entail were to be considered as part of the entailed estate, and that he was bound to lay out the prices either upon land, or to secure them to the same series of heirs that were pointed out by the deed of entail. Two decisions are to be found in the Teind Records to this effect, 28th January 1708, Marquis of Tweeddale *v.* Lord Blantyre, Records, vol. i. page 72. A like judgment was pronounced 18th February 1708, Riddel *v.* Duke of Roxburgh, Records, vol. i. page 160. See Connel, vol. i. page 489.

The same question came to be considered in a case of considerable importance in point of value, Trustees of Douglas Duke of Hamilton *v.* Archibald Duke of Hamilton, 26th June 1818, where the Second Division of the Court found precisely as in the preceding cases.

It will be observed that the heir of entail had much to say in his favour, because, in that case, there was no voluntary sale on his part, and therefore he had not contravened the terms of the entail; and as the entailer had made no provision whatever for that change of circumstances, he certainly had a right to maintain, that it was extending the limitations and provisions of the entail by implication, to compel him to make a new entail of that subject which had been altered by the law itself. The Court, however, justly paid no regard to such argument; and accordingly, on the principles of common law, found as has been above mentioned.

Even this very case of the teinds is an argument against the pursuer, demonstrating that it is impossible to maintain that the Act 1685 totally subverted the common law of Scotland; for it was only on the principles of the common law that the Court had any power whatsoever to order the reinvestment of the price of those teinds.

Upon this article it may be, in the last place, observed, that although the heir of entail may have the power of selling the estate repeatedly, yet even by the common law of Scotland there is a limitation on the exercise of this power, and on the exercise of the power of every proprietor, however unlimited; for whenever a person has a right of any description, the law of Scotland will restrain the proprietor from exercising his powers if done with the mere purpose of distressing others. Now, if an heir of entail were maliciously,

emulously, and in order to gratify his resentment against the substitute heirs, to sell the estate for the mere purpose of harassing them, the Court would most justly interfere, and prevent such a malicious exercise of power.

An idea has also prevailed, that the right of an heir insisting for reparation, in the case of a contravention of a prohibitory clause, would be rendered nugatory by a competition with onerous creditors. This, however, is *jus tertii* to the heir contravening, whose obligation to fulfil remains active, and he cannot shelter himself under the supposed existence of preferable rights. The same arguments equally apply to a case where a person has granted double rights. But the proposition is founded entirely upon mistake. The heir of entail insisting against the contravening heir will be preferred according to his diligence; and if debts and adjudications are guarded against by the irritant and resolute clauses, no creditor can properly compete, if the heir's diligence is preferable *per se*.

In the third place, it has been observed by the pursuer that there can be no claim of damages under an entail where there is a proper irritancy. In the reasoning on this question of damages, there appears to be a good deal of inaccuracy, and a great want of precision. The word damage has been used in our law precisely in the same way as the word *damnum* in the civil law; and therefore the claim of damage may arise, not only from quasi delinquency, but from contracts and quasi contracts, and includes under it simple reparation, or what is called in the civil law *omne quod abest a patrimonio*. The doctrine of damage is well explained by Lord Stair in Book i. tit. 9; therefore, when it is maintained that an heir of entail is liable in damages, in most cases it is intended to convey the claim merely of reparation, although there may be some instances where the heir of entail may be liable to the utmost extent in the name of damages. When the proper meaning is, therefore, attached to the word damage, there can be no doubt about the matter; and, therefore, to a certain extent, the pursuer is right in his proposition, that where there is an irritancy fixed by the party, there can be no claim of damages; because if the subject itself be restored to the party, it is impossible that the value also can be claimed; but, in this respect, there is no peculiarity in the deed of entail, for it is nothing else but the common law of Scotland in certain cases. This may be exemplified in the case of feus, which either contain an irritancy *in gremio*, or by the common law. If two years' feu-duty be allowed to run into the third, they may be forfeited by declarator; and if they are so, no damages can be claimed from the vassal; and so much so, that the superior cannot claim from him the by-gone feu-duties, on the non-payment of which his right has been forfeited. This will be found

decided, 14th July 1748, M'Vicar v. Cochrane and Kerr ; Kilkerran, 531.*

The same takes place in leases. If a proprietor brings a forfeiture of the lease, either at common law ; or in virtue of any prohibition contained in the lease ; or on the ground of the act of sederunt 1756 ; and in consequence thereof irritates the right, no claim of damages lies against the tenant for breach of contract. The proprietor gets his subject, and is liberated from his obligation towards the tenant. The same is also the rule where leases are prohibited to be assigned. The proprietor has the power of declaring the assignation null, and on obtaining the decree the right reverts to the tenant, and will perpetually revert to him, although he should a hundred times contravene his obligation ; but no damages can be claimed by the proprietor, and the only mode which the proprietor has to prevent a repetition of such conveyances or sales, if they may be so called, is to declare that if the tenant shall assign, the possession shall, on the contravention being declared, return to the proprietor ; and to be sure, in that event, the proprietor will obtain complete possession, but he can claim no damages.

From all this it will be seen that there is no peculiarity in the case of entail, as has been supposed by the pursuer.

The pursuer has urged very strongly that the very question which is now under discussion was fully considered in the Court of the last resort in the question of the Executors of the Duke of Queensberry against the heirs of entail. It is apprehended that there must be some mistake in this. In that branch of the case which was under consideration of the First Division of the Court, it is no doubt true that by the interlocutor there pronounced the heirs of entail were found liable in damages ; but the very next day after that judgment was pronounced it was observed that the judgment was somewhat inaccurately expressed, or rather that the finding of damages was somewhat premature. A note of that circumstance was taken at the time, whenever it was discovered, for the purpose of calling the attention of the Court to it when the case should be again submitted to consideration ; and in all probability the matter would have been put on a different footing, but it so happened that the parties thought fit immediately to carry to appeal that case, and the Court had no opportunity of considering the point.

But the reversal of that judgment seems to afford no grounds whatever for maintaining that the present question was at all considered in the view as urged by the pursuer, which must be obvious from considering the remit which was made of the case that is now

* Mor. 15095.

under the consideration of the Second Division; because in that remit the claim of grassum was reserved to the parties, which could not possibly have been made by the House of Lords, unless they had likewise been of opinion, that the heirs of entail are entitled to claim every thing which is taken from the entailed estate, and of course entitled to reparation. If the argument of the pursuer be sound, that judgment of the House of Lords is totally inconsistent with the principles they are now maintaining.

The varying signification of the word damage has certainly occasioned some inaccuracy in the reasoning on this subject. By the law of Scotland *damnum generaliter significat omnem diminutionem patrimonii*; and, therefore, it is even very possible for a claim of damages to exist in that sense concomitant with an irritancy and forfeiture. In that view,—and it could be only in that view that the House of Lords reserved the question of grassum; in any other view the reservation was inconsistent and improper—many analogous cases may be put; for instance, that of the case of Gordon of Ellon, or similar cases, where the mansion house is one of the special objects of the prohibitory clause, and where it is fenced and protected by the irritant and resolute clauses. It is believed that some instances of such entails may be adduced. Now, suppose that an heir of entail should disregard all these restraints, and should run the risk of attempting to pull down the mansion-house, and should dispose of the stones, wood, and lead of which it may be composed; there can be no question that when these materials are put into the shape of moveables by the heir, every purchaser of the wood, the stone, and the lead, will be safe, and these loose materials can be no longer subject to the operation of the entail, and a *rei vindicatio* will not be competent. But it is no less plain that as a prohibition has been contravened, and the irritant and resolute clauses applicable, forfeiture must take place just as much as forfeiture must follow in the case of contracting debts, where that is guarded against, whether it be a small or a large sum. But suppose forfeiture does ensue, the heir of entail can on no principle put into his own pocket the price of those stones, wood, and lead, which are part of the entailed estate and which he sold contrary to his obligation and contract. He cannot benefit by such wrong, or take what does not belong to him. As to the remainder of the estate, he forfeits the title to enjoy it, and he suffers the punishment to which he consented when he accepted of the estate.

From these circumstances it must be evident, that reparation is in no respect inconsistent either with annulling the right, or the forfeiture of the heir.

In the fourth place, it has been observed that the plea of the

defenders is contrary to the principles of the judgment in the case of Duntreath ; and that it is truly extending the fetters of an entail by implication. But with great submission, that is a mistaken view of the question ; because it is quite clear that wherever the provisions, limitations, or conditions are express, they must be carried into execution. If there be any doubt as to the existence of such limitations or provisions, then, no doubt, a most strict interpretation must be applied ; but whenever the obligation is acknowledged, it is entitled to the fair and just support of law, just like any other obligation. In that respect there is no distinction betwixt *bond fide* contracts, and those *stricti juris*. The effects of the obligation created are the same in both.

It may be further noticed, that however proper it may be now to adhere to what was fixed in the case of Duntreath, yet it is perfectly clear, on more mature deliberation, that it is a case which ought not to be extended. It is much to be lamented that when that case was decided a proper examination had not been made into the previous decided cases determined by the Court of Session ; and it is still more to be lamented that a more correct examination, or rather that the examination had not been made into the entails which had been executed, and to be found in the record ; and it is likely, had those authorities, and the terms of those entails been exhibited, a different result would have taken place. It is no doubt true that many eminent judges have approved of that decision ; but it is also no less true that lawyers just as eminent have been of a contrary opinion. In evidence of this, better authority cannot be resorted to than the opinion of the late Lord Chancellor Thurlow, in the case of Tillicoultry,* which was to this effect, “ Though it might be unnecessary to trouble your Lordships with any observations on this case, as in my opinion the judgment ought to be affirmed, I deem it expedient, however, to state the grounds which weigh with my mind in proposing the judgment I am to offer to the House.

“ The single question which has been agitated arises upon the effect of the prohibitory, irritant, and resolute clauses of an entail, and whether these prevented the estate from being disposed of. In fact the estate has been sold, but it was the purpose of the action to establish the validity of the sale.” Here his Lordship read the prohibitory, irritant, and resolute clauses of the entail. “ The prohibitory clause here is undoubtedly expressed broadly enough ; no argument has been raised on the irritant clause,

* Bruce v. Bruce, 15 Jan. 1799. Mor. 15539. The quotation is taken from a copy of Lord Thurlow's opinion, transmitted by his lordship to the late Mr. James Chalmers, solicitor, London, and now among the papers of Mr. Bruce of Arnot.

“ the whole rested upon the resolute clause. I must say that
“ under such a settlement, containing such clauses, no person other
“ than a Scotch lawyer could have any idea that the estate was not
“ sufficiently tied up from a sale. The parties interested were cer-
“ tainly of this opinion themselves at one period when they applied
“ to the Legislature for an Act of Parliament relative to the entailed
“ estate.

“ It is now contended, from the authority of decided cases, that
“ selling the estate is not a breach of the resolute clause. It is
“ truly said, that a prohibitory clause by itself will not do,—that an
“ irritant clause will not do,—and that if the resolute clause be not
“ broad enough we cannot go to the meaning and intent of the parties.

“ What reasons induced the Court to go so far as they have done
“ in these decided cases I am at a loss to know. The whole class of
“ cases which I allude to appear to me to be founded on some
“ political notions of the judges, that the law of the land was of a
“ mischievous tendency, and that by the judicial proceedings they
“ ought to meet what they deemed the bad policy of the law.

“ I own that the judgments given in the case of Duntreath and
“ other cases relative to entails appear to me to shock every
“ principle of common sense. In this country also a mode was
“ devised by the judges of getting rid of entails by fictitious
“ recoveries. It would have been more principled and wholesome
“ if the judges in both countries had applied to the legislature, when
“ they deemed the law required amendment, instead of thus repealing
“ it by judgments in Courts. It is too late now to enter into these
“ cases; the security of much landed property must lead your Lord-
“ ships necessarily to act on the principles recognised by the Courts,
“ and repeatedly in your Lordships’ house.

“ The question at present before your Lordships distinctly comes
“ to this point: Is the entail so conceived that the right of the heir
“ shall immediately resolve on his selling the estate? Looking at the
“ deed, no person can say that he does not in his conscience believe
“ that a sale was intended to be included in the resolute clause.
“ But the purpose has been rendered of no effect, by cramming the
“ clause with a long string of unnecessary words, and entering into
“ a detail where every thing meant was not specially mentioned.

“ If the resolute clause had stopped in its enumeration after the
“ words, ‘ contravene’ and ‘ incur the said clauses irritant or any of
“ them,’ there would have been no doubt in the present case; but it
“ goes on to specify by doing any of the following acts, relative to
“ the name and arms, marrying certain persons, or not accepting the
“ benefit of the entail. It then changes the phrase, ‘ or who shall
“ break or innovate, &c., or do any act by which the estate may be

" evicted or affected', &c. It may seem odd to make it a question
 " whether the selling an estate is an act by which it is evicted or
 " affected, yet in terms of the decided cases which I have alluded
 " to, and even according to the grammatical construction of the
 " present instrument, the question must be answered in the negative.

" The prohibitory clause here treats the words breaking the entail
 " and affecting the estate as different and distinct from selling,
 " annulling, and disposing of it. When these 'and break and
 " affect' occur again in the resolute clause, we must take them in
 " the same way as in the prohibitory clause.

" But the matter does not rest here. According to the decided
 " cases you cannot express or include a sale by these words. We
 " are therefore reduced to this, that while we have a full conviction
 " on our minds that the granter of the deed meant to prevent a sale,
 " yet we cannot act upon this, because the Court of Session has
 " with your consent, perhaps with your directions, decided many
 " cases another way; and the security of real estates in Scotland
 " would be cut down if your lordships were now to adopt the doc-
 " trine that a resolute clause is not good in such general words.

" Therefore when I move your Lordships to reverse the interlocu-
 " tors complained of, I shall give my vote as not content, protesting
 " that as a judge I never could have concurred in the former de-
 " cisions originally when they were pronounced."

Upon which the interlocutors were affirmed.

It is believed that the late Lord Loughborough also entertained the same sentiments.

In the fifth place, it has been noticed, and no doubt might make an impression at first sight, that it is remarkable that so few instances have occurred of a claim similar to the defender's, particularly as it is not to be supposed but instances must have occurred which might have induced heirs of entail to bring such claims before this period. This, however, can be easily explained; indeed in some of the older cases, in looking through the papers, the thing has been noticed, and the explanation which has been there given is to this effect:—that it has sometimes occurred that those who had the most immediate interest to bring a challenge of the land were so nearly connected with the contravener that they have rather chosen to avoid all dispute with him; and remoter heirs, having so little interest, and no prospect of benefit, have not thought it worth their while. It has also happened that those who had any inclination to make a claim of the kind have allowed their rights to lie over too long, and in that way the creditors have obtained the advantage over them, and the heir of entail deprived of the means of doing justice to the heirs.

It may further be noticed, that it may be doubted if the observation is founded in fact ; because if the question has occurred with respect to the prohibition regarding debts, and the Court have decided as to the rights of heirs of entail where the contracting of debt has not been fenced by irritant and resolute clauses, and yet have made them effectual against the heir of entail, those cases are just as much directly in point as that which is now under consideration. The same principles of law are applicable to both ; for the heir of entail would be no more bound to relieve the entailed estate of those debts than, according to the present argument, he would not be bound to reinvest. Now, that point as to the debts has been decided. Since the decision of the case of Tillicoultry the attention of heirs of entail has been more directed to this point ; and as to the cases which have occurred posterior thereto, all of them can be explained without resorting to the inference, that it was from an understanding of the parties of a deficiency in point of right.

The first of these which occurred in later times was one which respected the sale of the estate of Bonnington, which was defective in the same manner with that of Tillicoultry and Ascog. Mr. Cunningham of Bonnington sold that estate before the next heir of entail, Mr. Scott Moncrieff, knew of his intention. The next heir immediately raised an action in the same terms with the present, and arrested the price in the hands of the supposed purchaser. This led to an arrangement, and the next heir of entail agreed to accept of 10,000*l.* in lieu of the estate, and which has been settled on the same series of heirs with the entail.

With respect to Tillicoultry the heirs of entail did not sufficiently attend to their interest ; and in the course of some years the heir in possession came to be in such circumstances as to render the right unavailing. But it has so happened that he is now placed in a different situation, and the heirs of entail of Tillicoultry are now demanding fulfilment of their right, and which is a case now in dependence before the Second Division.*

With respect to the case of West Shiel, it is also to be noticed that the heirs of entail did not give up the claim to which they had a right, and had no intention of doing so ; but it so happened that immediately after the remit from the House of Lords circumstances occurred which rendered it improper, and indeed unnecessary, for those heirs of entail to proceed further in their suit. The next heir of entail who was at first immediately interested died, and then there emerged immediately after that a series of heirs who deprived those who had originally stepped forward of any prospect of bene-

* Bruce, 21 June 1827.

fitting by that succession almost at any period, and of course it was throwing away money on the declaration of a right from which there was no prospect of benefit.

The last case which was decided in the First Division of the Court, Earl of Breadalbane against General Campbell of Monziel, stands on the judgment of the Court of Session, who found that the heir of entail was bound to reinvest. That case has not been further insisted in, and upon the following grounds,—the friendship and intimacy subsisting between the two parties; and next, there have emerged also heirs of entail, which renders the question of very little importance.

Hence those matters which appear to make an impression with respect to the general understanding of the non-existence of those claims, depend on no solid foundation.

It has likewise been urged, that to give effect to prohibitory clauses, is an encroachment on the free use of property. But this argument is totally inconsistent with that free exercise of will permitted by the law of Scotland to all proprietors. The plea of the defender consists in the maintenance and preservation of that free liberty and power of disposal; whereas, on the other hand, the argument of the pursuer is founded on the denial and destruction of the free and uncontrolled exercise of that right. The pursuer denies to his benefactors and predecessors what he wishes to assume to himself as his sole right and privilege.

Lastly, there is one view of the question to which I have never seen any satisfactory answer.

It has been admitted, both in the papers and in the pleadings on the part of the pursuer, that the prohibition in this entail of Ascog creates, at least, such an obligation that it enables and bestows a right on the substitute heirs of entail to challenge all gratuitous and fraudulent deeds. It is admitted that such are struck at by the Act 1621, c. 18., which is, in fact, admitting that such prohibition is entitled to the protection of the common law; for the Act 1621 is nothing but a declaration of the common law, and it contains no reference, less or more, to deeds of entail, and indeed could not possibly do so. It is remarkable that this Act 1621 declares, that if the estate gets into the hands of a *bond fide* third party, it cannot be reclaimed, but, notwithstanding, reparation shall be due from the party contravening, or acting contrary to the enactment of that statute. Now, this being an admission of the party, that any gratuitous and fraudulent alienation entitles the heirs of entail to reparation, it does not appear what difference there can be in the present case. It is of no consequence from what motive the heir in possession is induced to contravene the prohibition. It is of no

consequence to the substitute heirs, whether the heir in possession was induced to contravene from a gratuitous motive, or an onerous one. It is equally a voluntary act on his part, and the injustice to the heirs substitutes is the same in both ; and in both also the heir in possession acts contrary to that obligation under which he has accepted the estate. It is apprehended, therefore, that as the consequences are the same, whether proceeding from the one motive or the other, and both proceeding from the same voluntary act, there appears to be no reason why the consequences ought not to be the same. It is apprehended that the word gratuitous, in the sense of the Act 1621, or common law, is more extensive than that affixed to it. It is not merely that alienation opposed strictly to the word onerous, but it means that conveyance in the terms of that Act, which is not just, not true, and not necessary.

Upon the whole of these grounds, I am humbly of opinion that the heir of entail of Ascog, if he sells the estate, is bound in reparation to the substitute heirs ; and that the Court ought to find accordingly.

INDEX OF MATTERS

IN

THE FIFTH VOLUME.

INDEX OF MATTERS

IN

VOLUME V.

ACQUIESCENCE.

Circumstances under which (affirming the judgment of the Court of Session) a claim for repetition of money alleged to have been paid in ignorance, held to be barred. *Dixons v. Monkland Canal Company*, Sept. 17, 1831, p. 445.

ADMINISTRATION OF JUSTICE. See *Appeal*, 1.—*Expences*, 1.

APPEAL.

1. Order on an agent to exhibit the authority for putting the name of a counsel to an appeal case, which was disclaimed by the counsel; and observations on alleged practice of doing so without authority. *Grahame v. Grahame*, Oct. 6, 1831, p. 759.

2. An order for the examination of three parties before a jury discharged, in respect of two of them being dead. *M'Gavin v. Stewart*, Oct. 18, 1831, p. 807.

See *Process*, 1.

ARBITRATION.

Held (affirming the judgment of the Court of Session) that although interim decreets-arbitral had been subscribed, given to the clerk, and copies sent to the parties, yet, as the submission was terminated without any final judgment and the decrees had never been delivered or recorded, they were null. *Gray and Woodrop v. M'Nair*, July 8, 1831, p. 305.

ASSIGNATION.

Circumstances in which held (affirming the judgment of the Court of Session) that an assignation of the share of company stock, consisting of leases, had been effectually transferred. *Russell v. Breadalbane*, April 4, 1831, p. 256.

See *Bankruptcy*, 2. (2.)—*Foreign*, 3.

BANKRUPTCY.

1. Circumstances in which (affirming the judgment of the Court of Session) objections to an offer of composition were repelled. *Robertsons v. Alexander, &c.*, Feb. 4, 1831, p. 1.

2. Held (affirming the judgment of the Court of Session)—

(1.) That it is competent for a creditor to apply for sequestration whose debt is of the statutory amount, but consists partly of a

INDEX OF MATTERS.

BANKRUPTCY (Continued).

sum originally due to himself, and partly of a debt purchased by him at an undervalue, subsequent to the bankruptcy :

(2.) That the assignation of such a debt requires to be written on a deed, and not on an ad valorem stamp :

(3.) That as no objection was taken to the assignation, in respect of its being written on a wrong stamp, until after sequestration was awarded, and as there was no room to suppose that the Court was aware of the objection, and as the defect was afterwards supplied, the sequestration was valid. *Robb v. Forrest*, Oct. 3, 1831, p. 740.

See *Foreign*, 1.—*Husband and Wife*, 3.—*Interest*, 2.—*Lease*, 5.

BURGH.

The town council of a royal burgh was empowered by the set, in the event of the person elected Dean of Guild by the guildry not producing evidence of his qualification to hold the office, to elect a Dean of Guild themselves; but they, in respect the party elected by a majority of the guildry was disqualified, found that another candidate supported by an apparent minority was duly elected, and that the votes for the other candidate, to whom no objection was stated at the meeting of guildry, were thrown away.—Held (affirming the judgment of the Court of Session) that the town council had not exercised their powers under the set, and that the election was null and void. *Magistrates of Dundee v. Lindsay*, March 17, 1831, p. 152.

CAUTIONER.

1. A party bound himself “to guarantee an agent for four per cent. for commission and guarantee,”—Held (affirming the judgment of the Court of Session) first, that this merely imported an obligation to guarantee the payment of the price for which goods sent to the agent should be sold, and not for his faithful conduct; and, second, that evidence of mercantile men was inadmissible to prove, that in practice the words comprehended an obligation to the latter effect. *Calder v. Aitchison and Co.*, Sept. 10, 1831, p. 410.
2. A party having in a bond for borrowed money bound himself with and for another as cautioner, surety, and full debtor, without a clause of relief, or an intimated bond of relief apart, found (affirming the judgment of the Court of Session) not to be liable after the lapse of seven years, nor barred by paying interest after that period. *Scott v. Yuille*, Sept. 15, 1831, p. 436.
3. A principal debtor in a bond for a cash account with a bank failed, and executed a trust, the deed of accession to which allowed a supersedere of diligence for three years; the bank lodged a claim and affidavit, without signing the deed of accession, and a delay of seven years took place, held (reversing the judgment of the Court of Session) that the cautioner was liberated. *Mackenzie v. Macartney*, Sept. 23, 1831, p. 504.
4. Circumstances in which held (affirming the judgment of the Court of Session) that the cautioners of a bank agent were released from their obligation by the conduct of the bank, in permitting him to carry on an illegal trade, to violate his instructions, to incur unusual

INDEX OF MATTERS.

CAUTIONER (Continued).

hazard and loss, to become deeply involved, and to commit important irregularities, without the cautioners being apprised. *Leith Bank v. Bell, &c.*, Oct. 1, 1831, p. 703.

CESSIO BONORUM. See *Process*, 5.

CHURCH.

After the Reformation, when the Crown was in right of the possessions of the bishops, a royal grant was given of certain lands, &c. in Orkney and Zetland, which had constituted an earldom previously forfeited to the Crown, together with the whole patronages, including expressly those acquired in consequence of the Reformation, as well as those otherwise belonging to the Crown, all being united into a single earldom and lordship. This earldom was subsequently forfeited and annexed to the Crown; and thereafter, on the restoration of episcopacy, but without obtaining a dissolution of the earldom, there was conferred on one of the new bishops the bishoprick of Orkney, including all the patronages previously belonging thereto, and the teinds and kirks of certain parishes specially mentioned, the benefices of which were declared to be suppressed, and the teinds to belong to the bishop, under burden of planting and providing for ministers, and with a general right of patronage of vicarages. The bishoprick was enjoyed by the several bishops during the subsistence of episcopacy, and all rights belonging thereto reverted to the Crown at the revolution. Thereafter a dissolution of the earldom having been obtained, and a new grant given:—Held (affirming the judgment of the Court of Session) that this grant formed a title of prescription, on which, if followed by possession, to prescribe against the Crown (as coming in place of the bishop) right to the patronage of the parishes specially contained in the titles of the bishoprick. *The King's Advocate v. Dundas*, Oct. 1, 1831, p. 723.

CLAUSE.

Where a party feued a steading of ground in Clyde Street, “with a proportional part of the water-side grass, which is to be a common property to the vassals of Clyde Street in all time coming,”—Held (affirming the judgment of the Court of Session), that the property of the water-side grass, and not merely a servitude, was conveyed. *Logans v. Wright, &c.*, April 2, 1831, p. 242.

See *Partnership*, 3.

COMPETITION. See *Foreign*, 3.

DEATH-BED.

1. Held (affirming the judgment of the Court of Session) that a deed executed on 6th December was not liable to be reduced *ex capite lecti*, although the grantor died on the 13th, and had been in bad health, confined to bed, and frequently intoxicated, both before and after the execution of the deed; but the disease of which she died arose posterior to its execution. *Mackay v. Davidson, &c.*, March 25, 1831, p. 210.
2. A party *mortis causâ* conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under

INDEX OF MATTERS.

DEATH-BED (Continued).

her hand; and in default of making such writing, to pay the residue to her next of kin; and thereafter executed a writing of directions on death-bed, which was challenged by the heir at law.—Held (affirming the judgment of the Court of Session) that if the heir could set aside such writing, he would thereby occasion that default, in the event of which the liege poustie deed had disposed in favour of the next of kin; and therefore he was barred by want of interest from insisting in a reduction of the deed. *Ker v. Lady Essex Ker's Trustees*, Oct. 1, 1831, p. 718.

See *Entail*, 3. (4.)

ENTAIL.

1. Held (affirming the judgment of the Court of Session) that an heir under a strict entail is not liable to implement an obligation granted by a preceding heir in a lease, to pay for the value of meliorations at its expiration. *Fraser v. Fraser*, Feb. 25, 1831, p. 69.

2. Question remitted, as to the validity of an entail executed by a father, who was bound by a marriage contract to secure his estates in favour of the heirs of the marriage, with power to make an entail, and had, as was alleged, exceeded that power. *Macpherson v. Macpherson and others*, Feb. 28, 1831, p. 77.

3. Held (affirming the judgment of the Court of Session)—

(1.) That an heir excluded by a deed of entail and deed of nomination of heirs, (executed according to the powers of the granter,) from an heritable succession in Scotland, had no legal title or interest to challenge a trust-deed as disposing of that succession in an irrational or otherwise illegal manner; the connexion between the trust and the other deeds not being such as to infer, that if the trust-deed were liable to objections from the nature of its provisions, the entail and nomination must thereby be rendered invalid;

(2.) That the objects and purposes of the trust-deed were clearly and intelligibly expressed; and there is no rule or principle established in the law of Scotland which renders it unlawful for a man, who is rei suæ arbiter, to appropriate the rents and profits of his estate under a trust in the manner provided by the trust-deed under reduction; that the case of the rents of heritable estates in Scotland being expressly excepted from the provisions of the Act 39th and 40th Geo. III. c. 98, while they are clearly extended to personal funds in Scotland, any implication involved in that exception is against the supposition of any nullity being understood to be established by the common law of Scotland, in such a trust, for the accumulation of rents or other funds for a limited term;

(3.) That the heir has no title or interest, under the Act of 39th and 40th Geo. III., to challenge the settlement of personal estate; and

(4.) That he cannot insist in the reduction of the last deed, on the head of death-bed, in respect that his title and interest are excluded by the previous deeds; and the last deed does not

INDEX OF MATTERS.

ENTAIL (Continued).

revoke, but substantially confirms all the prior deeds. *Strathmore v. Strathmore's Trustees*, March 23, 1831, p. 170.

4. Held (affirming the judgment of the Court of Session) that an heir under a strict entail was not liable in payment of an account due to a law agent employed by a preceding heir, although by his agency a large part of the estate was restored to the heir of entail. *Fraser v. Vans Agnew*, April 2, 1831, p. 249.
5. Held (affirming the judgment of the Court of Session)—1, that an heir of entail had by acts of homologation rendered himself liable for meliorations under an obligation granted in a tack by a preceding heir.—But, 2, (reversing the judgment) that under a clause in a lease, providing that the tenant should have right to the difference of value between the houses on the farm at the date of the tack, and of those on the farm at the termination of it, the tenant was entitled to the value in so far as the houses on the farm at the date of the tack were improved, or others suitable to the farm built in lieu of the same, and better than the same at the expiration of the tack; but not of houses built new except as above. *Graham v. Jolly*, June 29, 1831, p. 280.
6. An heir of entail was in possession of estates under an entail, restraining him by effective prohibitory, irritant, and resolute clauses from altering the order of succession, but not (as he considered) from contracting debt—circumstances in which (affirming the judgment of the Court of Session) the debt he contracted was regarded not to be a real debt, but the whole to be a collusive and simulate contrivance, with the view not to contract a true debt, but to alter the order of succession, and therefore the transaction was reduced at the instance of the next heir of entail.

The reading of the Statute 1685, that a defect in any part of the statutory requisition of an entail vitiated the whole entail, as well in questions with creditors as inter hæredes, rejected by the House of Lords. *Cathcart v. Cathcart*, July 18, 1831, p. 315.

7. Held (affirming the judgment of the Court of Session) that an estate in possession of an heir under a strict entail, on which infestment had followed in his favour, was liable to be adjudged for personal debt, contracted subsequent to the infestment, but prior to the recording the entail, although the adjudication was not raised or decree obtained thereon until after the entail had been recorded.

Observed, that the case of *Smollett*, May 14, 1807, (*Mor. Dic. App. 12. voce Tailzie*,) was not affected by the judgment in the House of Lords in the case of *Agnew of Sheuchan*, July 31, 1822.—(1 *Shaw's App.*, page 320.) *Munro v. Drummond*, Aug. 30, 1831, p. 359.

8. A party executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; thereafter he made a deed whereby he altered the line of succession, and

INDEX OF MATTERS.

ENTAIL (Continued).

nominated heirs preferably to the heirs female of the institute, and to the other heirs called after the substitution hæredibus nominandis; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination:—Held (affirming the judgment of the Court of Session on a remit from the House of Lords) that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. *Stewart v. Porterfield*, Sept. 23, 1831, p. 515.

9. Circumstances in which (affirming the judgment of the Court of Session) provisions to younger children granted under an entail giving power to the heirs of tailzie “to provide their younger children to reasonable provisions,” were sustained. *Earl of Mar v. Lady F. J. Erskine*, Sept. 28, 1831, p. 611.

- 10.—Circumstances under which it was held (affirming the judgment of the Court of Session)—

(1.) That an entail executed in implement of a decree-arbital did not prevent an heir substitute from selling part of the estate:

(2.) That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual:

(3.) That the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of *res judicata*:

(4.) That a sasine written on nine pages, but stated in the docquet to be on eight, was valid.

A posterior entail, inconsistent with the original one, was sustained; and an action was brought by the heirs substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it, for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute had the succession to the fee propelled to him under the second entail, and was infeft, and enrolled as a freeholder, and voted as such—Held,

(1.) That the original entail was annihilated;

(2.) That the action was not maintainable by that substitute, nor any others suing with him, notwithstanding the renunciation by him of the infeftment, and a decree of reduction, *pendente lite*, against the other heirs;—and,

(3.) That these objections were pleadable by the defenders, although not heirs of entail. *Dickson, &c. v. Cuninghame and Medwyn*, Oct. 1, 1831, p. 657.

11. Sale of lands by public roup sustained (affirming the judgment of the Court of Session) which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation and infeftment, engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the Register of Entails till after the sale. *Grahame v. Grahame*, Oct. 6, 1831, p. 759.

See *Service*, 1, 2.

INDEX OF MATTERS.

EXPENSES.

1. Two parties to a cause, having,—the one pending the cause and the other after he was cited as a haver,—destroyed documents,—Held (reversing the judgment of the Court of Session) that they were not entitled to the expenses of a petition and complaint presented against them in respect of these acts; and that the latter acted with indiscretion, and was liable in expenses. *Robertsons v. Alexander, &c.*, Feb. 4, 1831, p. 1.
2. Circumstances in which expenses ordered to be paid on both sides out of a trust estate. *Strathmore v. Strathmore's Trustees*, March 23, 1831, p. 170.
3. A party raised an action for 219*l.* 10*s.* 3*¼d.*, and the defender offered payment of 11*l.* and 10*l.*, with interest, but subject to such qualifications as did not amount to a tender; decree was pronounced against the defender for those sums, with interest, amounting to 42*l.*, and the pursuer was found liable in expenses—Held (reversing the judgment of the Court of Session) that the pursuer was not liable in expenses. *Brodie v. Sinclair*, Sept. 23, 1831, p. 567.
4. Held competent to award the prior expenses to a party, who was successful in a former appeal. *Dick v. Cuthbertson*, Oct. 1, 1831, p. 712.

FACULTY. See *Entail*, 8.

FISHING.

1. Circumstances under which (affirming the judgment of the Court of Session) a party was found entitled to challenge a yair erected by another in a loch for catching salmon, although it was alleged that it was erected in virtue of a title derived from the predecessor of the objector. *Duff v. Fraser*, Feb. 23, 1831, p. 57.
2. A party having brought an action, libelling that he was tacksman of the whole salmon fishings in a firth, and proprietor of other fishings in certain rivers flowing into it, against a proprietor of lands situated on the firth, and to have it found that the defender had no right to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing either in tack or property:—Held (affirming the judgment of the Court of Session) 1st, that although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and 2d, that the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender. *Mackenzie v. Houston*, Aug. 13, 1831, p. 422.

See *Interdict.—Process*, 2.

FOREIGN.

1. Held (reversing the judgment of the Court of Session) that English assignees under a commission of bankrupt have no power to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission. *Stein's Assignees v. Brown, &c.*, Feb. 23, 1831, p. 47.
2. Held (affirming the judgment of the Court of Session) that a trust-disposition of heritage duly tested, containing a direction to

INDEX OF MATTERS.

FOREIGN (Continued).

the trustee to convey to any person to be nominated by the truster, together with a testament executed according to the forms of Jamaica, where the truster resided, but not of Scotland, bequeathing his heritage to a particular person, constituted an effectual right in favour of that person, exclusive of the heir-at-law. *Brack v. Johnston and Hogg*, Feb. 25, 1831, p. 61.

8. Part of an entailed estate was sold for redemption of the land tax, and the surplus price lodged in bank, and thereafter lent out on heritable security by the statutory trustees; the heir apparent under the entail, during the life of the heir in possession, for onerous causes, executed in England an assignation in the English form of his right to draw the interest thereof during his life, and after his succession granted a general disposition of all his property to a trustee for behoof of his creditors, with a special disposition of his life interest in the entailed estate on which the trustee was infest:—Held, in a competition for the interest of the surplus price, (affirming the judgment of the Court of Session) that the right to draw it was carried by the assignation, and could not be defeated by the subsequent disposition to the trustee. *Scott v. Allnutt*, Sept. 10, 1831, p. 416.

FRAUD.

Held (affirming the judgment of the Court of Session) that although the grantor of a deed of settlement was proved to have been, prior and posterior to the execution of it, addicted to habits of intoxication, yet as there was no evidence (but the reverse) that she was drunk when executed, it was not reducible. *Mackay v. Davidson, &c.* March 25, 1831, p. 210.

HERITABLE AND MOVEABLE. See *Foreign*, 3.

HOMOLOGATION. See *Entail*, 5, 10.—*Foreign*, 1.

HUSBAND AND WIFE.

1. Held (affirming the judgment of the Court of Session)—1. That under a summons libelling a marriage chiefly on a consent per verba de præsenti, but also alleging that it would be otherwise proved by facts and circumstances, it was competent to find a marriage proved otherwise than by de præsenti words. 2. That letters, without containing any direct promise, and the conduct of a party, established a promise of marriage; and being followed by copula, a marriage was constituted. *Honyman v. Campbell, &c.*, March 13, 1831, p. 92.
2. A husband and wife executed a contract of separation and aliment, whereby the husband bound himself to pay to his wife during her life and separation an annuity of 30*l.* per annum, in consideration of which she renounced all legal claim against him; and the husband died while the contract of separation was unrevoked:—Held (affirming the judgment of the Court of Session) that the wife was not bound by that contract of separation, but was entitled to her legal provision as his widow, the annuity not being fair, onerous, and adequate, in the pecuniary circumstances of the husband. *Hunter v. Dickson*, September 19, 1831, p. 455.

INDEX OF MATTERS.

HUSBAND AND WIFE (Continued).

3. (1.) An estate was sold under burden of the price, being 60,000*l.*, and the interest of 10,000*l.*, being part of the price, was to be life-rented by the purchaser, (who had married the daughter of the seller,) and the purchaser became bankrupt, and the estate was judicially sold, and produced a sum inadequate to pay the price:—Held, in a question between the three daughters of the seller, as heirs-portioners, (affirming the judgment of the Court of Session) that two of them were entitled to be ranked on the interest of the 10,000*l.*, to the effect of realizing full payment of their shares of the price, to the exclusion of their sister during the life of her husband the purchaser.

(2.) Circumstances in which (affirming the judgment of the Court of Session) interest on arrear of interest was allowed from the next term after the date of citation of the holder of a fund in a multiplepoinding of which he was the nominal raiser. *Napier v. Gordon, &c.* Oct. 3, 1831, p. 745.

See *Sasine*, (2.)

INTERDICT.

Circumstances in which (affirming the judgment of the Court of Session with a qualification) an interdict was renewed against fishing in part of a river, and although no prayer to that effect was contained in the petition and complaint. *Magistrates of Dingwall v. M'Kenzie*, July 11, 1831, p. 351.

See *Nuisance*.

INTEREST.

1. Where a lady, as executrix *quà* relict, gratuitously undertook “the gradual payment and extinction” of the debts of her deceased husband, “by making payment and satisfaction” thereof out of her estate, chiefly by annual payments, contemplated to be effected in five years; and after a term of years paid off the greater part of these debts, and in the interim made successive partial payments and adjustments of interest with some of the creditors to a considerable extent; but never paid any interest, arising subsequent to her husband's death, to a certain class of English creditors under bonds or bills; and the House of Lords having found, in a question with the creditors, that the estate was liable for the debts till “paid and extinguished,”—Held (affirming the judgment of the Court of Session) that the estate was liable to the creditors for the interest accruing on her husband's debts while unpaid, although it had cost her a much greater sacrifice of property to pay off the principal than she had any reason to expect at the date of granting the gratuitous obligation. *Lady Montgomerie v. Rundell, &c.*, March 25, 1831, p. 201.

2. Accumulation of interest at the date of the action and of the decree not allowed in respect of mora. *J. Mackenzie's Trustees v. A. Mackenzie's Trustees*, Oct. 15, 1831, p. 796.

See *Husband and Wife*, 3. (1.)—*Partnership*, 4. (4.)

JUS TERTII. See *Fishing*, 2.

INDEX OF MATTERS.

KING.

Found (reversing the judgment of the Court of Session) that the keeper of the King's park of Holyrood House is not entitled to work quarries in the park to any extent. *Officers of State v. Earl of Haddington*, Sept. 24, 1831, p. 570.

LANDLORD AND TENANT. See *Lease*.

LEASE.

1. Circumstances in which it was found (affirming the judgment of the Court of Session) that a party had acquired no real right to a farm under an improbativ lease. *Pentland v. Murray, &c.*, Feb. 15, 1831, p. 28.
2. Held (affirming the judgment of the Court of Session) that it is competent for a landlord to insist in an action of mails and duties, and a process of sequestration, against a tenant, at one and the same time. *Pentland v. Booth*, March 31, 1831, p. 228.
3. Held (affirming the judgment of the Court of Session) that a tenant under a written lease must give notice forty days before Whitsunday of his intention to remove, otherwise he will be held to continue in possession by tacit relocation. *M'Intyre v. M'Nab's Trustees*, July 8, 1831, p. 299.
4. Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant was not entitled to a stipulated deduction of rent in respect of not being provided with a road in terms of his lease, a road equally good being enjoyed by him. *Burns and Grier v. Stewart*, July 27, 1831, p. 356.
5. A mercantile company in possession of a lease borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; the bank thereupon granted a sub-lease to the company, who remained in possession and paid the rents; and no possession was taken by the bank:—Held, (affirming the judgment of the Court of Session) in a question with the trustee on the sequestrated estate of the company, (without deciding the general question with respect to the sufficiency of intimation without possession,) that the assignation was not effectual against the creditors. *Cabbell v. Brock*, Sept. 23, 1831, p. 476.
6. Tack was granted to a tenant, "his heirs, assignees, and sub-tenants," with warrandice to him and "his foresaid;" the tenant granted a sub-tack with a clause of warrandice, but did not assign the warrandice in the tack; and the tack was reduced as ultra vires of the granter, and the sub-tenant thereupon removed:—Held (reversing the judgment of the Court of Session) that the sub-tenant had no title to sue a direct action of damages founded on the warrandice in the tack against the landlord. *Executors of William Duke of Queensberry v. Mackill Maxwell*, Oct. 12, 1831, p. 771.

See *Assignation—Entail*, 5.

LEGACY. See *Testament*.

MARRIAGE. See *Husband and Wife*, 1.

MARRIAGE CONTRACT. See *Husband and Wife*, 2.

INDEX OF MATTERS.

MORA. See *Interest*, 2.

NUISANCE.

Found (affirming the judgment of the Court of Session) that it is competent to grant interim interdict prospectively against boiling whale blubber in the neighbourhood of a burgh. *Burntisland Whale Co., &c. v. Trotter, &c.*, Oct. 1, 1831, p. 649.

OBLIGATION. See *Fraud—Interest*, 1.

PARTNERSHIP.

1. Held (reversing the judgment of the Court of Session) that when there is no conclusive written evidence fixing the proportion of profits to be drawn by partners, the question is one for a jury; and a remit made to try an issue accordingly. *Thomson v. Campbell's Trustees*, Feb. 14, 1831, p. 16.

2. What facts and circumstances held (affirming judgment of the Court of Session) sufficient to establish that a party was a partner of a trading company. *Gillon v. Mackinlay, &c.*, Sept. 22, 1831, p. 468.

3. Held (reversing the judgment of the Court of Session) that calling up payment of instalments on shares subscribed for in a joint stock company did not fall under "ordinary business," and could not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the Company. *Clyne v. Sclater, &c.*, Sept. 29, 1831, p. 625.

4. Two individuals, having entered into a joint speculation in the purchase of an estate, held (affirming the judgment of the Court of Session)—

(1.) That neither party was liable in damages for the manner in which this joint adventure was conducted;

(2.) That, notwithstanding a change of circumstances, the eighth article of their contract of copartnery remained binding;

(3.) That one of the parties was prevented from objecting to an accountant's report, and was not entitled to factor-fee; and

(4.) That it was not usurious for the parties to stipulate that interest should be allowed by the one to the other out of the clear rents and profits of the estate, including the making a rest at the end of the year, *Hunter v. Cochrane, &c.*, Sept. 30, 1831, p. 639.

5. Three separate contracts having been entered into by copartners in the course of five years,—Held, that the last contract was to be explained by the first; but observed, that a recital in a deed is not operative, unless for the purpose of explaining what is doubtful; that under the contracts one of the partners was entitled to a share of profits against his copartners, personally, and not merely out of the reversion of the company estates; and that he was not liable in a loss in a question with his copartners. *J. Mackenzie's Trustees v. A. Mackenzie's Trustees*, Oct. 15, 1831, No. 61.

See *Assignment*.

PATRONAGE. See *Church*.

PERSONAL OBJECTION. See *Cautioner*, 2.—*Entail*, 10.

PRESCRIPTION.

A proprietor of heritable subjects granted an *ex facie* absolute disposition, on which infestment was taken, qualified by a back bond

INDEX OF MATTERS.

PRESCRIPTION (Continued).

containing a power of redemption within eleven years ; he assigned this bond to a third party, and disposed the property to him ; and the assignee, within the eleven years, raised an action of redemption, which fell asleep ; and the heir of the original disponee acquired right to the assignation and relative action, which he afterwards awakened.—Held, in an action of reduction on fraud and incapacity, (affirming the judgment of the Court of Session) that although more than forty years had elapsed from the date of the above deeds, yet a prescriptive title had not been obtained, so as to exclude a challenge by the heir. *Hume, &c. v. Duncan*, Feb. 18, 1831, p. 43.

See *Cautioner*, 2.—*Church—Entail*, 8.

PROCESS.

1. After an appeal had been entered against a judgment reducing an election of Magistrates, and the parties (as was alleged) came to an understanding, for political reasons, to allow it to be heard *ex parte*, found competent for a burgess, although not a member of Council, to be sisted and heard as respondent, but that a candidate as Member of Parliament was not so entitled. *Magistrates of Dundee v. Lindsay*, March 17, 1831, p. 152.
2. Held (affirming the judgment of the Court of Session) that where an issue was sent to a jury as to whether a dam dyke was “to the injury and damage of the pursuers” as proprietors of salmon fishings in a river, it was not competent for the judge to direct the jury that the question put in issue, and the only question which they were to consider, was, whether it was injurious in the actual condition of the river, and with reference to the existence of the dykes in the river. Observed, that it is incompetent to construe the issues by referring to the previous pleadings. *Leys, Masson, &c. v. Forbes, &c.*, Sept. 7, 1831, p. 384.
3. A person raised an action against tradesmen employed by him to furnish pipes for supplying his house with water, concluding for repayment of the sums paid to account of the price, and for damages in respect of the insufficiency of the work,—Held (reversing the judgment of the Court of Session) that having stated the facts on which he founded in his summons and condescendence, which the defenders fully and explicitly answered, it was too late thereafter to deny the relevancy of the facts condescended on ; and the case remitted to the Court of Session, with instructions to direct an issue to be framed to try the question. *M'Donald v. Mackie and Co.*, Sept. 21, 1831, p. 462.
4. Observations on the mode of pleading in the Scotch Courts. *Gillon v. Mackinlay, &c.*, Sept. 22, 1831, p. 468.
5. Objections in a process of *cessio*,—That the certificate of imprisonment only bore from the 14th of one month to the 14th of another, but did not state if the pursuer had remained in prison in the interval ; that all the creditors had not been called ; and that the pursuer had from time to time varied the amount of his debts ; repelled (affirming the judgment of the Court of Session). *Hunter v. Gardner*, Sept. 28, 1831, p. 616.

INDEX OF MATTERS.

PROCESS (Continued).

6. Circumstances in which held (affirming the judgment of the Court below) that it is incompetent for the Court of Session to review an interlocutor of the Jury Court by suspension. *Megget and Roy v. Douglas*, Sept. 28, 1831, p. 622.

See *Fishing*, 2.—*Husband and Wife*, 1.—*Lease*, 2.—*Partnership*, 1.

PROOF. See *Cautioner*, 1.—*Partnership*, 1, 2.—*Process*, 2.—*Testament*.

PROPERTY. See *King—Statute*.

PROVISIONS TO CHILDREN. See *Entail*, 9.

REMOVING. See *Lease*, 3.

REPARATION. See *Partnership*, 4.—*Process*, 3.

REPETITION.

Is there by the law of Scotland a *condictio indebiti*, where the ignorance is not *facti* but *juris*? *Dixons v. Monkland Canal Company*, Sept. 17, 1831, p. 445.

RES JUDICATA. See *Entail*, 10. (3.)

RETENTION. See *Right in Security*.

RIGHT IN SECURITY.

Held, (affirming the judgment of the Court of Session) that an *ex facie* absolute assignation of the share in a company, qualified by a declaration in a back bond that it was granted in security of a specific debt, entitled the assignee to retain in security of a general balance arising on other debts subsequently contracted. *Russell v. Breadalbane*, April 4, 1831, p. 256.

See *Lease*, 5.

SALE.

1. Grain, situated in a bonded warehouse, was sold by the occupier to another, who ordered it to be transferred to an agent, making an advance on the faith of it; and the seller delivered his set of the keys to the agent, the other set remaining with the revenue officer:—Held (reversing the judgment of the Court of Session) that although no written agreement of transfer had passed between the seller and buyer, and no entry was made in the books of the revenue officers, yet complete delivery had been made to the agent, and that the above statute did not apply. *Maxwell & Co. v. Stevenson & Co.*, April 4, 1831, p. 269.

2. Held (affirming the judgment of the Court of Session) that the purchaser of a property at public sale, who had successfully suspended a charge for payment on the ground of a defect in the title offered, and had frequently insisted for fulfilment, but who had never proposed to abandon the bargain, was not entitled, on a good title being offered after a lapse of eleven years, to refuse it on the pretext of being free altogether. *Dick v. Cuthbertson*, Oct. 1, 1831, p. 712.

See *Entail*, 10, 11.

SASINE.

(1.) Found (affirming the judgment of the Court of Session) that a precept of *seisin* is not exhausted by an unrecorded *infestment*.

INDEX OF MATTERS.

SASINE (Continued).

(2.) What discrepancy between the signature of a witness to a marriage contract and the name in the testing clause held not to invalidate the contract, or, on that ground, to render null an infestment taken upon the contract. *Kibbles v. Stevenson, &c.*, Sept. 23, 1831, p. 553.

See *Entail*, 10. (4.)

SEPTENNIAL PRESCRIPTION. See *Cautioner*, 2.

SEQUESTRATION. See *Bankruptcy*, 1, 2.

SERVICE.

1. A proprietor in fee simple having executed an entail of his estate in favour of his eldest son and issue; whom failing, of the second son and issue; whom failing, of other substitutes, reserving his own liferent, and power to revoke, alter, sell, and burden the estate. The eldest son predeceased him, without taking infestment, and the reserved powers never were exercised; the entailer at his death left the deed undelivered. The second son survived, but made up no titles. A general service was expedite in favour of his son, as heir of tailzie and provision of his grandfather, the entailer, and infestment followed under the precept in the entail.—Question remitted for the opinion of all the Judges; 1. Whether the service was valid? and, 2. Whether the service should have been to the eldest son, the institute in the entail, or to any other and what person? *Colquhoun v. Colquhoun*, Feb. 17, 1831, p. 32.

2. Held (affirming the judgment of the Court of Session) in a question as to the validity of a service, that there was sufficient evidence before the jury to prove that the party served was the substitute called in a deed of entail,—the party challenging having failed to establish the existence of any other person to whom the designation in the entail could apply. *Galbraith v. Galbraith*, March 1, 1831, p. 84.

STAMP. See *Bankruptcy*, 2. (2.)

STATUTE.

Held (affirming the judgment of the Court of Session) that statutory trustees, under a power to open quarries, had no right to enter to and take stones from a quarry open and worked prior to the statute. *Trustees of Stonehaven Harbour v. Keith*, April 2, 1831, p. 234.

STAT. 1685. See *Entail*, 6.

STAT. 6 GEO. IV. c. 112. See *Sale*, 1.

TENDER. See *Expenses*, 3.

TESTAMENT.

A party by a probative testament appointed a person, who would not otherwise have succeeded, to be her executor, “subject to the payment of such bequests as I may instruct him to pay, in a letter signed by me of this date, to the several persons therein named;” declaring, “that after these several persons therein named have been paid and discharged their several legacies,” the whole residue should belong to the executor; and the testator died two days thereafter, leaving this will in her repositories, with

INDEX OF MATTERS.

TESTAMENT (Continued).

a letter within it containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by her, but not holograph nor tested ; which letter, it was offered to be proved, had been signed by the testator simul ac semel with the testament :—Held (reversing the judgment of the Court of Session) that it was competent to prove the identity of the letter with that referred to in the will ; and the case remitted, with an issue to that effect. Inglis, &c. v. Harper, Oct. 18, 1831, p. 785.

TITLE TO EXCLUDE. See *Prescription*.

TITLE TO PURSUE. See *Death-bed*, 2.—*Entail*, 3, 10,—*Fishing*, 1, 2.—*Lease*, 6.—*Process*, 1.

TRUST. See *Entail*, 3.—*Expenses*, 2.—*Foreign*, 2.—*Statute*.

USURY. See *Partnership*, 4.

WARRANTICE. See *Lease*, 6.

WRIT. See *Foreign*, 2.—*Sasine*.

INDEX OF NAMES

IN

VOLUME V.

<i>Appellants.</i>	<i>Respondents.</i>	No.	Page.
Advocate, Lord,	Dundas, Lord,	55	723
Brack, William,	{ Johnston, George, Hogg, } Adam, and Others,	8	61
Brodie, George,	Sinclair, William,	43	567
Burns, John, and Grier, } Robert,	Stewart, Duncan,	28	356
Burntisland Whale Fishing } Company, James Farnie, } and Others,	Trotter, William, and Others,	50	649
Cabbell, William, (Cashier to } the Glasgow Bank Com- } pany,) and Others,	Brock, James, (Newbigging } and Co.'s Trustee,) }	39	476
Calder, John,	Aitchison, George, and Co.,	31	410
Campbell's Trustee,	Breadalbane, Earl of,	21	256
Cathcart, John,	Cathcart, Sir John Andrew,	27	315
Clyne, David,	Sclater, Robert, &c.,	48	625
Colquhoun, Sir James,	Colquhoun, Robert,	4	32
Dick, John,	Cuthbertson, Donald,	53	712
Dickson, David, and Others, } Dingwall, Magistrates of, } and Others,	{ Cuninghame, and Lord Med- } wyn,	51	657
Dixon, John and William,	M'Kenzie, Hon. Mrs. Hay,	26	351
Duff, Hugh Robert,	Monkland Canal Company,	35	445
Dundee, Magistrates of,	Fraser, Thomas Alexander,	7	57
	Lindsay, John Mackenzie,	13	152
Elibank's Trustee, Lord,	Allnutt, John,	32	416
Farnie and Others,	Trotter, William, and Others,	50	649
Fraser, Alexander,	{ Agnew, Lieut.-Col. Patrick } Vans,	20	249
Fraser, Archibald Thomas } Fred.,	Fraser, Thomas Alexander,	9	69

INDEX OF NAMES.

<i>Appellants.</i>	<i>Respondents.</i>	No.	Page.
Galbraith, James,	Galbraith, Richard,	11	84
Gillon, William Downe,	{ Mackinlay, Archibald, and Others, (for the Edinburgh and Leith Shipping Com- pany,)	38	468
Glasgow Bank Company,	{ Brock, (Newbigging and Co.'s Trustee,)	39	476
Graham, Francis,	Jolly, Stewart,	23	280
Grahame, Barron,	Grahame, Sarah, &c.,	58	759
Gray, Robert, and Woodrop, John,	{ M'Nair, James,	25	305
Honyman, Sir Richard,	{ Campbell or Honyman, Eli- zabeth,	12	92
Hume, James, and Others,	Duncan, William,	5	43
Hunter, George,	{ Cochrane, Hon. Mrs. C., and Others,	49	639
Hunter, James, (Roughead's Trustee,)	{ Dickson, Isobel,	36	455
Hunter, John,	Gardner, George,	46	616
Inglis, William, &c.,	Harper, James,	60	785
Ker, J. B., &c.,	Ker's Trustees, Lady Essex,	54	718
Kibbles, Janet and Elizabeth,	Stevenson, John, and Others,	42	553
King's Advocate,	Dundas, Lord,	55	723
Leith Banking Company,	Bell, John, &c.,	52	703
Leys, Masson, and Co.,	Forbes, Lord, and Others,	30	384
Logan, Walter and John Maxwell,	{ Wright, John, and Others,	19	242
M'Culloch, John,	M'Culloch, J. W.,	Note.	180
M'Donald, William,	Mackie and Company,	37	462
M'Gavin, James,	Stewart, James,	62	807
M'Intyre, Christian, and Others,	{ M'Nab's Trustees,	24	299
Mackay, Flora,	{ Davidson, James Gillespie, and Others, Trustees for Mrs. Mackinnon,	16	210
Mackenzie, Murdo,	{ Macartney, Alexander, for the Commercial Bank of Scotland,	40	504
Mackenzie, Murdo,	Houston, Thomas,	33	422
Mackenzie's Trustees, John,	Mackenzie's Trustees, Alex.,	61	796
Macpherson, Captain Ewen,	{ Cameron, or Macpherson, Mrs. Catharine, and Others, Trustees of Colonel Mac- pherson,	10	77
Mar, Earl of,	Erskine, Lady F.J., and Others,	45	611
Maxwell and Co.,	Stevenson and Co.,	22	269

INDEX OF NAMES.

<i>Appellants.</i>	<i>Respondents.</i>	No.	Page.
Megget and Roy, W. S.,	{ Douglas, Alex., W. S., for Brydon and Others,	47	622
Montgomerie, Lady Mary,	{ Rundell, Bridge, and Run- dell, &c.,	15	201
Munro, Catherine,	Drummond and Others,	29	359
Napier, John, and Mrs. Scott,	Gordon, Lady, and Others	57	745
Officers of State,	Haddington, Earl of,	44	570
Pentland, George,	{ Murray and Others, (for the Hon. Alex. Oliphant Mur- ray,) and Trustees of Lord and Lady Elibank,	3	28
Pentland, George,	{ Booth, James, (Trustee for the Royal Exchange As- surance Company,) and Others,	17	228
Queensberry, Executors of Duke of,	{ Maxwell, Mackill,	59	771
Robb, Donald,	Forrest, James,	56	740
Robertson, John, and Others,	{ Alexander, Edward, and Smith, Alexander,	1	1
Roughead's Trustee,	Dickson, Isobel,	36	455
Russell, Claud, (Campbell's Trustee,)	{ Breadalbane, Earl of,	21	256
Scott, Elizabeth,	Yuille, Robert,	34	436
Scott, James, (Lord Elibank's Trustee,)	{ Allnutt, John,	32	416
Stein's Assignees,	Brown and Gibson-Craig,	6	47
Stewart, Sir Michael Shaw,	Porterfield, James Corbet,	41	515
Stonehaven Harbour, Trus- tees of,	{ Keith, Sir Alexander,	18	234
Strathmore, Thomas Earl of,	{ Strathmore's Trustees, John Earl of,	14	170
Thomson, James,	Campbell's Trustees,	2	16

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
Agnew, Lieut.-Col. Patrick Vans,	{ Fraser, Alexander,	20	249
Aitchison, George, and Co.,	Calder, John,	31	410
Alexander, Edward, and Smith, Alexander,	{ Robertson, John, and Others,	1	1
Allnutt, John,	{ Scott, James, (Lord Elibank's Trustee,)	32	416

INDEX OF NAMES.

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
Bell, John, &c.,	Leith Banking Company,	52	703
Booth, James, (Trustee for the Royal Exchange As- surance Company,) and Others,	Pentland, George,	17	228
Breadalbane, Earl of,	Russell, Claud, (Campbell's Trustee,)	21	256
Brock, James, (Newbigging and Co.'s Trustee,)	Cabbell, William Burrridge, Cashier to the Glasgow Bank Company, and Others,	30	476
Brown and Gibson-Craig, Brydon and Others,	Stein's Assignees, Megget and Roy, W.S.,	- 6 47	47 622
Cameron or Macpherson, Mrs. Catharine, and Others, (Trustees of the late Co- lonel Macpherson,)	Macpherson, Captain Ewen,	10	77
Campbell's Trustees,	Thomson, James,	2	16
Campbell or Honyman, Eli- zabeth,	Honyman, Sir Richard,	12	92
Cathcart, Sir John Andrew, Cochrane, Hon. Mrs. C., and Others,	Cathcart, John, Hunter, George,	27 49	315 639
Colquhoun, Robert, Commercial Bank of Scotland, Cuninghame and Lord Med- wyn,	Colquhoun, Sir James, Mackenzie, Murdo, Dickson, David, and Others,	4 40 51	32 504 657
Cuthbertson, Donald,	Dick, John,	53	712
Davidson, James Gillespie, and Others, (Trustees for Mrs. Mackinnon,)	Mackay, Flora,	16	210
Dickson, Isobel,	Hunter, James, (Roughead's Trustee,)	36	455
Douglas, Alex., W. S., (for Brydon and Others,)	Megget and Roy, W. S.,	47	622
Drummond and Others,	Munro, Catherine,	29	359
Duncan, William,	Hume, James, and Others,	5	43
Dundas, Lord,	King's Advocate,	55	723
Edinburgh and Leith Ship- ping Company,	Gillon, William Downe,	38	468
Elibank's Trustees, Lord and Lady, and Others,	Pentland, George,	3	28
Erskine, Lady F. J., and Others,	Mar, Earl of,	45	611
Forbes, Lord, and Others,	Leys, Masson, and Co.,	30	384
Forrest, James,	Robb, Donald,	56	740
Fraser, Thomas Alexander,	Duff, Hugh Robert,	7	57
Fraser, Thomas Alexander,	Fraser, Archibald Thomas Frederick,	9	69

INDEX OF NAMES.

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
Galbraith, Richard,	Galbraith, James,	11	84
Gardner, George,	Hunter, John,	46	616
Gordon, Lady, and Others,	Napier, John, and Mrs. Scott,	57	745
Grahame, Sarah, &c.,	Grahame, Barron,	58	759
Haddington, Earl of,	State, Officers of,	44	570
Harper, James,	Inglis, William, &c.,	60	785
Houston, Thomas,	Mackenzie, Murdo,	33	422
Johnston, George. Hogg, } Adam, and Others,	Brack, William,	8	61
Jolly, Stewart,	Graham, Francis,	23	280
Keith, Sir Alexander,	{ Stonehaven Harbour, Trus- } tees of,	18	234
Ker's Trustees, Lady Essex,	Ker, J. B., &c.,	54	718
Lindsay, John Mackenzie,	Dundee, Magistrates of,	13	152
Macartney, Alexander, (for } the Commercial Bank of } Scotland,)	Mackenzie, Murdo,	40	504
M'Culloch, J. W.,	M'Culloch, John,	Note.	180
M'Kenzie, Hon. Mrs. Hay,	{ Dingwall, Magistrates of, } and Others,	26	351
Mackenzie's Trustees, Alex.,	Mackenzie's Trustees, John,	61	796
Mackie and Company,	M'Donald, William,	37	462
Mackinlay, Archibald, and } Others, (for the Edinburgh } and Leith Shipping Com- } pany,)	Gillon, William Downe,	38	468
Mackinnon's Trustees, Mrs.,	Mackay, Flora,	16	210
M'Nab's Trustees,	{ M'Intyre, Christian, and } Others,	24	299
M'Nair, James,	{ Gray, Robert, and Woodrop, } John,	25	305
Macpherson's Trustees, the } late Colonel,	Macpherson, Captain Ewen,	10	77
Maxwell, Mackill,	{ Queensberry, Executors of } Duke of,	59	771
Medwyn, Lord, and Cuning- } hame,	Dickson, David, and Others,	51	657
Monkland Canal Company,	Dixon, John and William,	35	445
Murray and Others, (for the } Hon. Alex. Oliphant Mur- } ray,) and Trustees of Lord } and Lady Elibank,	Pentland, George,	3	28
Newbigging and Co.'s Trus- } tee,	{ Cabbell, William Burrridge, } (Cashier to the Glasgow } Bank Company,) and Others,	39	476

INDEX OF NAMES.

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
Porterfield, James Corbet,	Stewart, Sir Michael Shaw,	41	515
Royal Exchange Assurance Co.'s Trustee,	Pentland George,	17	228
Rundell, Bridge, and Run- dell, &c.,	Montgomerie, Lady Mary,	15	201
Sclater, Robert,	Clyne, David,	48	625
Sinclair, William	Brodie, George,	43	567
Stevenson and Co.,	Maxwell and Co.,	22	260
Stevenson, John, and Others,	Kibbles, Janet, and Elizabeth,	42	553
Stewart, Duncan,	Burns, John, and Grier, Robert,	28	356
Stewart, James,	M'Gavin, James,	62	807
Strathmore's Trustees, John Earl of,	Strathmore, Thomas Earl of,	14	170
Trotter, William, and Others,	Burntisland Whale Fishing Company, James Farnie, and Others,	50	649
Wright, John, and Others,	Logan, Walter and John Maxwell,	19	242
Yuille, Robert,	Scott, Elizabeth,	34	436



3 6105 063 371 772

